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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1253

LYLE S. WOODCOCK,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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COMMONWEALTH OF MASSACHUSETTS,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Petitioner, Lyle S. Woodcock, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Judicial Court of Massachusetts, entered on November 4, 1971.

OPINION OF THE COURT BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, printed in Appendix A hereto [1], is reported in 1971 Mass. Adv. Sh. 1367, 275 N.E. 2d 33.

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[1] The Appendices are bound separately in the Joint Appendix of Petitioner and Liberty Loan Corporation.

JURISDICTION

The judgment of the court below was entered on November 4, 1971, and is printed in Appendix B hereto. A petition for rehearing, filed on November 18, 1971, was denied on November 23, 1971 (Appendices F, G). On January 24, 1972, Mr. Justice Brennan extended the time for filing this petition to and including April 2, 1972 (Appendix H). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3) since Petitioner had specially set up and claimed certain rights under the Constitution of the United States.

QUESTIONS PRESENTED[2]

1. (a) Was Petitioner denied due process of law and equal protection of the laws by the denial of his Motion For Leave To File Motion To Dismiss on the ground that it was untimely, when the motion was filed at the earliest possible moment, and could not have been filed earlier only because the information on which it was based was withheld by the prosecution?

(b) Is it an error of constitutional dimension that the grand jury here returned indictments on insufficient evidence?

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[2] To avoid burdening the Court with unnecessary duplication, Petitioner adopts and incorporates herein the questions presented in the Petitions for Certiorari filed herein by Beneficial Finance Co. and Household Finance Company which argue that Petitioners were denied equal protection of the laws and due process of law because of the manner in which the indictments were procured from the grand jury. Petitioner duly raised these issues in a pre-trial motion to dismiss and other pleadings and exceptions, preserved them on appeal in his assignments of error, specifically preserved them by adopting, on page 4 of his pre-trial brief in the court below the arguments pertaining thereto by the other defendants, and the Massachusetts Supreme Judicial Court specifically recognized that this Petitioner had duly preserved and presented the questions and expressly rejected these federal constitutional claims. See pages A-5 to A-22, A-29 to A-33 of Joint Appendix filed herewith.

2. Is this record of Petitioner's ensnarement final proof that the "mass trial" technique is fundamentally incompatible with due process of law?

3. Did the prosecution's suppression of material evidence deny Petitioner due process of law?

4. Was it a denial of due process of law for the court below to affirm the denial of Petitioner's motion for a directed verdict by resorting to evidence not admitted against Petitioner?

5. When Petitioner's bribery conviction could be affirmed only by applying a statute passed a year and a half after trial, was it a denial of due process and the application of law ex post facto?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Art. 1, §9, cl. 3

No Bill of Attainder or ex post facto Law shall be passed.

Art. 1, §10, cl. 1

... No State Law shall ... pass any ... ex post facto ....

Amendments, Art. 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and ... to be confronted with the witnesses against him ...

Amendments, Art. XIV, §1

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Constitution, Pt. 1, Art. XII

No subject shall be held to answer for any crime or offense, until the same is fully and plainly, substantially and formally, described to him . . .

Mass. Gen. Laws (Ter. Ed.)

c. 268, § 7. Whoever corruptly gives, offers or promises to a legislative, executive, judicial, county or municipal officer, after his election or appointment, either before or after he has qualified or has taken his seat, any gift or gratuity whatever, with intent to influence his act, vote or opinion, decision or judgment upon any matter, question, cause or proceeding which may be then pending, or which may by law come or be brought before him in his official capacity, or as a consideration for any speech, work or service in connection therewith, shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than three thousand dollars and imprisonment in jail for not more than one year.

c. 274, §1 A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

c. 274, §2 Whoever aids in the commission of a felony, or is an accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be indicted, tried and punished as a principal.

c. 277, §47A The pleadings in criminal proceedings shall be the indictment or complaint, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers, challenges to the array and to the manner of selection of grand or traverse jurors, and motions

to quash are hereby abolished, and any defenses and objections, which could have been raised before trial by one or more of them prior to October fourth, nineteen hundred and sixty-five, shall be raised only by motion to dismiss or by a motion to grant appropriate relief, as hereinafter provided.

Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

Defenses and objections based on defects in the institution of the prosecution or in the indictment or complaint, other than a failure to show jurisdiction in the court or to charge an offense, may be raised only by motion before trial. Such motion shall include all such defenses and objections then available to the defendant and shall set out such defenses in separately numbered paragraphs with particularity. Any facts relied upon in support of any of said defenses shall be stated in an affidavit attached to said motion. Failure to present any such defense or objection shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceedings.

The motion shall be made before the plea is entered, but may either by a general court rule or by order of the justice be made within a reasonable time thereafter. Upon an appeal to the superior court from a conviction in a district court, any motion permitted under this section may be filed in the superior court within ten days after the entry of the appeal, or within such reasonable further time as the court may allow by special order or general rule.

A motion before trial raising such defenses or objections shall be determined before trial, unless the court orders that it be deferred for determination at the trial of the general issue.

If a motion is determined adversely to the defendant, he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or complaint, it may order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or complaint. Nothing in this section shall be deemed to affect the provisions of any statute relating to periods of limitations. Added St. 1965, c. 617, § 1, as amended St. 1965, c. 756, § 1.

Rules of the Superior Court

Rule 101A

PLEA OF NOT GUILTY

(Applicable to criminal cases)

A plea of not guilty, whether voluntarily made by the defendant or entered by order of the Court, shall not be deemed to be a waiver of matters in bar or abatement or an admission of the validity of the indictment or complaint. A defendant at the time of the entry of such plea, or within ten days thereafter or within such further time as the Court may order, may file such motions and other pleadings relating to matters in bar or abatement or to the validity of the indictment or complaint as he may desire without at any time retracting the plea of not guilty.

Lack of jurisdiction or the failure of the indictment or complaint to charge an offense may be raised at any time during the pendency of the proceedings.

STATEMENT OF THE CASE

In 1964, 129 indictments were returned by a Special Grand Jury charging that various members of the small loans industry had conspired to bribe and had offered or given bribes to certain public officials, against whom indictments were also returned for conspiracy to solicit and for soliciting or accepting bribes. Petitioner Lyle S. Woodcock,[3] a vice-president of Liberty Loan Corporation,[4] was named as a defendant in five indictments. One of the indictments was dismissed before trial, and Petitioner was found not guilty on a second, which was the subject of a second trial. The three indictments naming Petitioner, which are the subject of this petition, were joined for trial which began on July 17, 1967 with 45 other indictments involving 72 separate counts, against 14 other defendants. Two of the defendants were public officials charged in 17 indictments with conspiracy to solicit bribes and soliciting and accepting bribes. The remaining defendants were charged with conspiracy to bribe and offering or giving bribes to those two officials.

During the trial, hundreds of items of documentary and testimonial evidence were limited to particular defendants. The limitations announced to the jurors at various times included 50 different combinations of individual and corporate defendants. After finding that sufficient evidence of conspiracy existed, the court granted in many particulars the Commonwealth's motions to change the limita-

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[3] Hereinafter referred to as "Woodcock."
[4] Hereinafter referred to as "Liberty."

tions on 48 items of evidence. (Appendix C, D). On November 2, 1968, the court announced to the jury nearly 700 extensions as to the 48 items, referring only generally to the particular items of evidence which had been introduced over the preceding 72 trial days.

An example of one of those instructions, which referred to testimony given on October 3, was:

> "Item 46 is testimony by Heath that he was at the State House one day and at a closed door to a room in which the Rate Board was holding an executive session, that it was the day that the Board made a decision, that he had a talk with Glynn there about what was going on, and he testified to what he said and what Glynn said, and testified to how long the public hearing was, and he testified about someone reading a statement at that public hearing. That is admitted as to the additional defendants Barber, Pratt, Farrell and Woodcock, Beneficial, Household and Liberty — excuse me. I will start over again. That is admitted as to the defendant Barber, Pratt, Farrell and Woodcock on one conspiracy indictment — that is 11900, charging conspiracy to offer a bribe to Hanley; and as to those same four defendants, Barber, Pratt, Farrell and Woodcock, that item was admitted on Counts 1 of each of four different indictments, that Count 1 in these indictments charging a different one of these persons with offering a bribe to Hanley. In addition, this item has been admitted as to Beneficial, Household and Liberty on each of the two conspiracy indictments, 11900 relating to Hanley, 11910 relating to Garfinkle. This item also has been admitted as to Beneficial as to both counts of 11901, as to Household as to both counts of 11905, and as to Liberty as to both counts of 11997. Now, in these last three indictments there are two

counts in each indictment. One alleges the offering of a bribe to Hanley, the other alleges offering of a bribe to Garfinkle."

(I Tr. 5237-5238).

During the recital of those limitations, which lasted 90 minutes, there was considerable confusion, and even error. For example, the court had denied the Commonwealth's motion to admit Item 32 against Liberty on the substantive indictments, but told the jury that it was admitted against Liberty on Count 1 of the substantive indictment. (I Tr. 5228).

Of the 48 items, only three were originally admitted against Woodcock (and none against Liberty), and 21 were never admitted against Woodcock (23 were never admitted against Liberty). See Figure 1, *infra* p. 39.

Prior to trial, and on several occasions during trial, Petitioner objected to the joining of his case with so many others, and moved for severance. Petitioner constantly alleged that he could not receive a constitutionally fair trial. These motions were all denied, and their denials affirmed by the Massachusetts Supreme Judicial Court.[5]

Prior to trial, Petitioner requested that he be provided with the minutes of the Grand Jury, which request was denied. However, on September 26, 1966, after trial had run for two months, the prosecution provided Petitioner with a portion of the Grand Jury testimony of William F.

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[5] The constitutional issue, presented in Question 2, was raised and argued by Petitioner and Liberty in the trial court by several motions for severance (R.* 1526, 1622, 1629, 1672, 1681, 1738; I. Tr. 689, 847, 1588, 3987, 4853, 5394), and in the court below. Consolidated Brief of the Defendants, at pages 111 to 145. The court below considered and rejected Petitioners' contentions. Appendix A, pages A-22 to A-27, A-121 to A-124.

* "R." refers to the Summary of Record below.
"I. Tr." refers to the transcript of the first trial.

Heath, the principal Commonwealth witness. Petitioner thereupon, on September 28, 1966, filed a Motion For Leave To File Motion To Dismiss and an accompanying Motion To Dismiss, followed the next day by a Substitute Motion To Dismiss. These motions alleged, denial of due process in that there had been insufficient evidence for the grand jury to have returned the indictments against Petitioner.

The court denied Petitioner leave to file the Motion To Dismiss, and the Massachusetts Supreme Judicial Court affirmed.[6]

During the trial, the only incriminating evidence against Petitioner consisted of the testimony of William F. Heath.[7] Heath stated that he attended a meeting in New York on October 17, 1962, at which various members of the small loans industry were present. The meeting had been called for two legitimate reasons, but during the course of the meeting someone from another company brought up the possibility of bribing the small loans Rate Board for $75,000. This was considered preposterous by most people at the meeting. Heath then suggested it could be done for $25,000. Heath testified that Woodcock then said "in substance" and "to the best of [Heath's] present memory," " 'at the $25,000 figure perhaps we have no choice, but I want it clearly understood that the figure is $25,000 and not one penny more, and no one is to come back at a later date and request that the figure be raised, under any conditions.' " Barber of Household Finance was chosen as the

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[6] The constitutional issues, presented in Question 1., were raised and argued by Petitioner and Liberty in the trial court and in the court below. Consolidated Brief of the Defendants on Pre-Trial Errors, at pages 5 to 16; Defendants' Reply Brief, at pages 2-6. The constitutional issues were rejected by the court below. Appendix A, pages A-33 to A-35.

[7] Heath, an employee of another loan company, was alleged to be a co-conspirator, but not a defendant, as was his company.

person to handle the offer to Hanley. Heath's testimony as to that one sentence he said was spoken by Woodcock was the entire case against Woodcock.

Two of the persons present said they had no authority to commit their companies. Heath said he and two others had no authority to commit their companies. There was no evidence *admitted against Woodcock* as to the authority of any of the others. There was no other evidence concerning any words or acts of Woodcock (or anyone else from Liberty).

The Massachusetts Supreme Judicial Court upheld the denials of Woodcock's motions for directed verdicts, unconstitutionally applying evidence not admitted against Woodcock as to the authority of other defendants,[8] and unconstitutionally and *sub silentio* applying *ex post facto* a new statute, passed, a year and a half after trial, which eliminated a distinction between principals and accessories before the fact in felony cases, thereby unconstitutionally making conspiracy sufficient evidence of substantive guilt for the first time in Massachusetts.[9]

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[8] Motions for directed verdicts on the conspiracy indictments were filed in the trial court, and argued in the court below. Consolidated Brief of the Defendants, at pages 25 to 52. Petitioner's contentions were rejected by the court below. Appendix A, pages A-57 to A-58.

The specific constitutional issue, presented in Question 4., arose only through the opinion of the court below unexpectedly upholding the conspiracy on the basis of evidence not admitted against Petitioner or Liberty. That constitutional issue was raised in a petition for rehearing (Appendix F), which was considered by the court below and denied (Appendix G) as to Petitioner and Liberty.

[9] Motions for directed verdicts on the substantive indictments were filed in the trial court, and argued in the court below. Consolidated Brief of the Defendants, at pages 52 to 59. Petitioners' contentions were rejected by the court below. Appendix A, pages A-135 to A-136. The constitutional issues, presented in Question 5., relate to the fact that the court below, unexpectedly, failed to follow applicable Massachusetts law, and applied new law retroactively. These constitutional issues were raised in a petition for rehearing (Appendix F), which was considered by the court below and denied (Appendix G) as to Petitioner and Liberty.

The jury returned verdicts of guilty on all three indictments, finding that Petitioner conspired to bribe and offered to bribe the two public officials. He was sentenced to serve 2 1/2 to 3 years in prison on the substantive indictment, and one year in the house of correction on and after the prison sentence is served on the conspiracy indictment. Execution of the sentences has been stayed pending this Court's action.

During the second trial, at which Petitioner was found not guilty, the Commonwealth produced additional grand jury testimony which contained material which was exculpatory of the charges in the first trial, showing that Heath had a prior grudge against Woodcock, despite his testimony at the first trial that he was on friendly terms with all Liberty personnel. More important, however, were two other items. The first showed that the prosecutor had misrepresented the facts when he warned defense counsel in the first trial that if he cross-examined Heath on apparently exculpatory grand jury testimony, he would bring out evidence of other criminality. At the second trial it was learned that the evidence was exculpatory and no other criminality would have been elicited had Heath been examined on it. The grand jury testimony also showed, along with other evidence, that the prosecution had intentionally suppressed evidence of Heath's expense accounts, according to a "deal" made with Heath, which indicated that there was no important incriminating restaurant meeting prior to the Hotel Commodore meeting such as Heath had testified to during the first trial.

Upon receiving the foregoing material, Petitioner and Liberty filed a Motion For New Trial, which was denied after hearing (Appendix E) and the denial affirmed by the Massachusetts Supreme Judicial Court.[10]

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[10] The constitutional issue, presented in Question 3., was raised and argued by Petitioner and Liberty in the trial court by a motion for a new

REASONS FOR GRANTING THE WRIT

1. It Was A Denial Of Equal Protection Of The Law And Due Process Of Law To Deny Petitioner's Motion For Leave To File Motion To Dismiss And To Deny The Motion Which Demonstrated There Was Insufficient Evidence Before The Grand Jury.

Two days after receiving the relevant grand jury testimony during the course of trial, Petitioner filed a Motion For Leave To File Motion To Dismiss, and an appended Motion To Dismiss (the next day replaced by a Substitute Motion To Dismiss). The motions alleged that the recently received grand jury testimony demonstrated that there was insufficient evidence before the grand jury to warrant the return of these indictments. (It is important to note that Petitioner had requested, and been denied, the grand jury testimony before trial.)

The trial court denied Petitioner leave to file, and the Massachusetts Supreme Judicial Court affirmed, holding:[11]

1) "Return of an indictment on insufficient evidence is not an error of constitutional dimensions such as to compel a judge to consider an untimely motion."

2) The motion was untimely because not filed before trial, despite the fact that Petitioner did not receive the transcripts until two days before the motion was filed.

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trial (R. 1960). It was argued to the court below, Consolidated Brief of the Defendants, at pages 59 to 92. The court below considered and rejected Petitioners' contentions. Appendix A, pages A-127 to A-135. The relevant opinion of the trial court is printed in Appendix E, pages E-1 to E-38.

[11] Appendix A, at pages A-33 to A-35.

3) The trial judge had discretion to consider the motion to dismiss, but did not abuse his discretion in refusing to do so since Petitioner made "no showing of any reason sufficiently strong or impelling to require . . . [him] to exercise [his] discretion" to permit Petitioner to file his motion to dismiss.

A. There Could Be No Constitutionally Valid Exercise Of Discretion Against Consideration Of This Motion

Under Massachusetts practice, Petitioner had the absolute right to file a motion to dismiss within ten days after pleading not guilty.[12] In this case, Petitioner did not file such a motion (on the ground relevant here) before trial commenced because he did not have the facts on which to base it. Petitioner did, however, seek to learn the facts by filing a timely motion for the production of the grand jury minutes, which motion was opposed by the Commonwealth and denied by the trial judge. Petitioner was thereby prevented from learning the facts on which his motion to dismiss was based until September 26, 1966, when the Commonwealth provided the grand jury minutes. The Commonwealth, by withholding the information until after the time for filing a motion to dismiss had run, effectively prevented Petitioner from presenting the issue to the court.

This practice of the Commonwealth amounted to the withholding of exculpatory evidence to the prejudice of Petitioner. The effect of the holding below is to allow a prosecutor to withhold exculpatory evidence until trial begins, secure that a motion to dismiss based upon such

[12] In the past, entry of a plea was considered a waiver of the right to challenge the indictment. *In Re Lebowitch, Petitioner*, 235 Mass. 357, 126 N.E. 831. However, now, by statute (G.L. c. 277, §47A) and Rule (Rule 101A of the Superior Court), the court may relieve a defendant of the presumption of waiver. Neither the Commonwealth nor the courts below charged the Petitioner with waiver.

evidence would be ruled untimely and the evidence would lose its exculpatory value. This is a clear evasion of the constitutional edict of *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, and *Giles* v. *Maryland*, 386 U.S. 66, 87 S. Ct. 793, and constituted a denial of due process of law.

In addition, it is a denial of equal protection of the law in that it distinguishes on an irrational basis between those defendants who have early access to grand jury minutes and those whose access to the minutes comes later. While there might be reason for giving some defendants such access later than others, there is no reason for denying the latter the same right to file a motion to dismiss as that granted to the former.

It is certainly reasonable to make procedural rules that require motions to be filed within reasonable periods of time. But when those rules are arbitrary, or are used to prevent a diligent defendant from exercising rights granted to others, they cannot stand.

Here, it is conceded that Petitioner in no way waived his rights or lacked diligence. He filed his motion within two days of receiving the information. He was prevented from earlier filing only by the Commonwealth's withholding of the evidence. That can not be considered a reasonable distinction, or a reasonable case in which to exercise discretion against consideration of a motion.

B. *The Substantive Issue Sought To Be Raised By The Petitioner Has Constitutional Dimensions*

The court below recognized that the trial judge would have been obliged to allow the filing of the motion to dismiss if the substantive issue that Petitioner sought to raise had been one of constitutional dimensions. However, the court found that it was not, citing *Costello* v. *United States*, 350 U.S. 359, 363-364, 76 S.Ct. 406, 408-409, and *Lawn* v. *United*

States, 355 U.S. 339, 349-350, 78 S.Ct. 311, 317-318. Those cases do not determine the issue.

Article XII of the Declaration of Rights of the Massachusetts Constitution has been held to require that no person be held to answer for a felony unless upon indictment by a grand jury. *Commonwealth* v. *Holley*, 3 Gray (69 Mass.) 458, 459; *Jones* v. *Robbins*, 8 Gray (74 Mass.) 329, 344; *DeGiolger* v. *Commonwealth*, 314 Mass. 626, 627-629, 51 N.E.2d 251, 252-253, and cases cited therein. This Court has held that while the Fourteenth Amendment does not necessarily require state prosecutions to be instituted by indictments of grand juries, a state that does provide that right must also provide for fair grand juries. *Hurtado* v. *State of California*, 110 U.S. 516, 4 S.Ct. 111; *Kennedy* v. *Walker*, 337 U.S. 901, 69 S.Ct. 1046; *Pierre* v. *State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536 (Negroes cannot be excluded); *Beck* v. *Washington*, 365 U.S. 866, 82 S.Ct. 955 (certiorari granted to determine whether a state, having once resorted to a grand jury, is required to furnish one free from substantive bias. The Court found it unnecessary to determine the issue ultimately, however. 369 U.S. 541, 546, 82 S. Ct. 958.)

In analogous areas, the Court has held that state appellate review must be fair if there is any at all. *E.g.*, *Douglas* v. *Green*, 363 U.S. 192, 80 S.Ct. 1048; *Frank* v. *Mangum*, 237 U.S. 309, 327, 35 S.Ct. 582, 587.

In Massachusetts a conviction can be reversed because of unfair procedures in the grand jury process. *Commonwealth* v. *Harris*, 231 Mass. 584, 121 N.E. 584. See also *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419-420; *Opinion of the Justices*, 232 Mass. 601, 604, 123 N.E. 100, 101; *Commonwealth* v. *Farulli*, 352 Mass. 95, 116-126, 224 N.E.2d 422, (dissenting opinion). The question here is one of whether there is a constitutional requirement that States provide substantive as well as

procedural due process. It is well established in other areas that they must. For example, *Thompson* v. *Louisville*, 362 U.S. 194, 80 S.Ct. 625; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S.Ct. 248; and *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S.Ct. 360, held that a trial by jury was not enough; there must also be sufficient evidence before that jury to justify its decision.

The precise issue presented here has not yet been met squarely by this Court. *Holt* v. *United States*, 218 U.S. 245, 31 S.Ct. 2; *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 406; and *Lawn* v. *United States*, 355 U.S. 339, 78 S.Ct. 311, decided only that "tainted" evidence before the grand jury was not reason to quash an indictment. (*Holt*—a confession made incompetent by the circumstances surrounding it; *Costello*—hearsay; *Lawn*—illegally seized evidence.) While it is true that the Court in dictum in those cases seemed to be making a broader rule, that rule has not been established, and clarification is needed. As the concurring opinion in the *Costello* case stated:

> "I assume that this Court would not preclude an examination of grand-jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." 350 U.S. at 364; 76 S.Ct. at 409.

A number of other cases support that view.[12a]

Since it has long been held that the constitutional requirement is that a grand jury return an indictment not

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[12a] *Cox* v. *Vaught*, 52 F.2d 562 (10th Cir. 1931); *Brady* v. *United States*, 24 F.2d 405 (8th Cir. 1924); *Murdick* v. *United States*, 15

based on prejudice, whim, or caprice, but only on probable cause, the court below, in stating that Petitioners raised no issue "of constitutional dimensions *such as* to compel a judge to consider an untimely motion," (emphasis added) must have been holding that even when there is a clear violation of the constitutional requirement of probable cause, there need be no remedy. This has been allowed in cases where the error is harmless. *Harrington* v. *California*, 395 U.S. 250, 89 S.Ct. 1726. But here the error is clearly prejudicial if Petitioner's allegations are true, and the interest of the Commonwealth in the procedural barring of this claim is minimal at best.[13]

F.2d 965 (8th Cir. 1926); *Anderson* v. *United States*, 273 Fed. 20 (8th Cir. 1921); *United States* v. *James*, 187 F.Supp. 439 (W.D. La. 1960), *reversed on other grounds*, 290 F.2d 866 (5th Cir. 1961); *State* v. *Parks*, Alaska Sup. Ct. 437 P.2d 642 (1968); *People* v. *Crosby*, 25 Cal. Rep. 847, 375 P.2d 839 (1962); *Pinell* v. *Supreme Court*, 42 Col. Rep. 676 (1965); *People* v. *Frost*, 120 N.Y.S.2d 911, 204 Misc. 44 (1953); *State* v. *Lawler*, 221 Wis. 423, 267 N.W. 65 (1936). *See Laughlin* v. *United States*, 385 F.2d 287, 291 (D.C. Cir. 1967); *United States* v. *Costello*, 221 F.2d 668, 677 (2d Cir. 1956), *aff'd*, 350 U.S. 359. And in *Russell* v. *United States*, 369 U.S. 749, 770, 369 S.Ct. 1038, 1050, this Court pointed out that it was unacceptable that a defendant ". . . be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." See also *Connor* v. *Picard*, 434 F.2d 673 (1st Cir. 1970), *reversed on other grounds, sub nom. Picard* v. *Connor*, 404 U.S. 270, 92 S.Ct. 509.

[13] The adequate and independent state ground doctrine presents no barrier to this Court's power of review over this issue. The state procedural ground relied upon by the court below was, by its express terms (A-34), so "interwoven" with the adverse determination of Petitioner's federal claim that the state ground cannot be an independent matter. *Enterprise Irr. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U.S. 157, 164, 37 S.Ct. 318, 321. Moreover, the lower court's recognition that this issue could be raised at a late stage and determined as a matter of discretion empowers this Court to review the issue under its holding in *Williams* v. *Georgia*, 349 U.S. 375, 383, 75 S. Ct. 814, 819. In any event, since no legitimate state interest can be served by insistence on compliance with the state procedural rule—an impossible task for Petitioner under the facts herein—the state ground is inadequate. *Henry* v. *Mississippi*, 379 U.S. 143, 85 S.Ct. 564.

C. *There Was No Probable Cause For The Return Of The Indictment*

The standard on which a Massachusetts grand jury is to return an indictment is the familiar one of probable cause. *Commonwealth* v. *Holly*, 3 Gray (69 Mass.) 458, 459; *Jones* v. *Robbins*, 8 Gray (74 Mass.) 329, 344. No more difficulty is presented in reviewing any such case than in those cases raising issues of probable cause to arrest or search.

In this case, however, the court below noted that assuming "that the portion of the transcript here submitted was insufficient to sustain the indictments, the Stipulation of the parties "does not state that there was no other evidence before the Grand Jury bearing on these indictments...." The Stipulation does say that this was all the relevant evidence "To the best of the Commonwealth's knowledge ..." At the hearing on the motion, the Commonwealth was invited to add any evidence it thought relevant. To this day, the Commonwealth has not claimed that there was any. If such evidence exists, the petitioners waive any objections they might have to its submission as an appendix to the Commonwealth's Brief herein.

It seems patent that here the court below was taking unfair advantage of petitioners' good faith attempt to ease the burden of the courts by limiting the record as much as possible, which effort was assisted by the trial counsel for Commonwealth. The Commonwealth's trial counsel never indicated—either at oral argument or in their Memorandum of Law—that they relied on any inference that other evidence might exist. The device of implying that the prosecution has other evidence is unfair, dishonest and a violation of due process of law.

The evidence on which the grand jury returned the indictments against petitioners is contained in 25 pages of transcript. It shows that Woodcock was one of 8 or 9 men from

various loan companies who met in the Hotel Commodore in New York in October, 1962, to discuss two legitimate matters: the feasibility of forming a new trade association in Massachusetts, and the gathering of statistics to present a case at the forthcoming rate board hearing. That during the meeting, Farrell (of Beneficial Management) raised the issue of whether they should "do anything about the rate board to perhaps insure a favorable result." That when Glynn (also of Beneficial) suggested that it would cost fifty to seventy-five thousand dollars, "statements were made that they were not going to participate in a program of that size." Heath (of American Investment) suggested that it would only co $25,000.00, at "which everybody was in agreement . . . there was complete agreement that the figure of twenty-five was all right." Barber (of Household Finance) was chosen to handle the deal.

Heath also stated that: "a chain man like [Heath] always had to say: 'In my opinion, I believe we will participate, but I will naturally have to clear the home office and get final approval,' and no one in my position ever had the authority to commit the company at that particular moment."

That testimony can only indicate that the men at the meeting agreed to recommend a particular plan to their companies. The conspiracy charged could only have been entered into after the "home office" of the companies had given final approval. There was considerable evidence indicating that indeed the home offices of some companies did give final approval, and that they entered into a conspiracy. *But not one word was mentioned at any time thereafter about Woodcock, Liberty, or any other Liberty employee.* The only inference that could reasonably be drawn is that Liberty did not give final approval, and that they, the Petitioners, did not ultimately join the conspiracy.

If A and B are heard to ask C to join with them to rob a bank, and C says "I'll have to let you know tomorrow," there is no probable cause to arrest C, even after the bank has been robbed, unless there is further evidence that C did or said something to indicate he had joined the conspiracy. This is no different. If Woodcock could not have been arrested on that testimony consistent with Fourth Amendment requirements, then he could not be put to trial on it either.

2. This Petitioner's Ensnarement Is Final Proof That Due Process Is Denied Whenever The "Mass Trial" Technique Is Utilized.

In this trial, which lasted from July 18, 1966, to December 18, 1966, which joined together 15 defendants in 48 indictments having 77 counts, but in which Petitioner was a defendant in only 3 indictments having 4 counts, in which the transcript of evidence consists of 103 volumes containing more than 7,500 pages, only one sentence, testified to by only one witness, was incriminating to Petitioner. And that sentence was repeated only "in substance" and to the "best of [the witness's] present memory" some four years after it had allegedly been uttered, and the witness had not ascribed so much as one word to Petitioner in several appearances before the Crime Commission and the grand jury.

The witness, William F. Heath, named as a co-conspirator but not a defendant, testified from September 21, 1966, to November 4, 1966. His testimony covers some 2,000 pages of transcript. The only part of his testimony that even concerned Petitioner was contained in 101 pages of direct testimony (and 67 pages of cross-examination) describing a meeting at the Hotel Commodore in New York on October

17, 1962, at which the conspiracy is alleged to have been formed. At that meeting, which for the most part concerned legitimate topics, Petitioner is mentioned as saying only three things, only one of which was incriminating. He is alleged to have said, "at the $25,000 figure perhaps we have no choice, but I want it clearly understood that the figure is $25,000 and not one penny more, and no one is to come back at a later date and request that the figure be raised, under any conditions." This witness had complete power over every defendant. He exonerated some defendants by saying that they said they did not have authority and would report to their companies.

As an example of how slim was his evidence, he could have exonerated Petitioner completely by making the sentence read: "perhaps we'll have no choice" or "perhaps we'd have no choice" instead of "perhaps we have no choice." And even he admitted that he was not reporting verbatim, but only "in substance," "to the best of [his] present memory."

With the exception of his testimony about that meeting, Heath's testimony concerned only the many activities and statements of the many co-defendants, both before and after the meeting, some of which was, and some of which was not, ultimately admitted against Petitioner. As a result of a finding of conspiracy, the trial judge, on motion of the Government, changed original limitations on 48 items of evidence, 27 of which he admitted against Petitioner (only 24 against Liberty), but 21 of which he did not admit against Petitioner. (See Appendices C, D) And some of the 27 items were admitted only on certain counts or certain indictments. Of the 48 items, only three had been originally admitted against Petitioner (none against Liberty). Figure 1, *infra*, p. 39 contains a chart showing the original and extended limitations. Of course, there were many volumes of additional

testimony originally admitted against other defendants which were never admitted against Petitioner.[14] The chart shows only those items on which the original limitations were extended. While even a most careful and skillful jurist, as was the trial judge here, armed with charts, transcripts, and notes, had difficulty in keeping the evidence sorted "into separate intellectual boxes," *People* v. *Aranda*, 63 Cal.2d 518, 529, 47 Cal. Rptr. 353, 359-60, 407 P.2d 265, 271-72 (1965), it would be a mere "willing suspension of disbelief," in Coleridge's phrase, to expect such impossible performance from the lay jurors. In the case at bar, some testimony was admitted only as to individual defendants; some as to all corporate defendants; some as to only some corporate defendants; some on only one conspiracy indictment; some on one conspiracy indictment and one count of a substantive indictment; others on two conspiracy indictments, and one count of a substantive indictment; still others on both conspiracy and both substantive indictments —all as to some but not all of the defendants. Rather than require the jury to apprehend these minutiae and perform a realistically impossible mental gymnastic—which only a computer might perform—of ignoring certain damaging evidence with a pageantry of varying limitations and yet objectively determine the guilt or innocence of the defendants, the court would have adverted the prejudice by granting severance. *Sims* v. *United States*, 405 F.2d 1381 (D.C. Cir. 1968); *United States* v. *Branker*, 395 F.2d 886-

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[14] For example, there was considerable testimony by Heath concerning a luncheon meeting at Purcell's restaurant at which Heath, Glynn, and Pratt discussed how they would bring up the subject of trying to bribe the Rate Board at the forthcoming Hotel Commodore meeting. I Tr. 3528-3531, 3563-3577, 3581-3582. This topic is treated further *infra*, pp. 29, 32.

Another example is Heath's testimony that Glynn had told him that Hanley and another had gone to Washington, "at which time the package was delivered." (I Tr. 3929-3931.)

87 (2d Cir. 1968); *United States* v. *Bozza*, 395 F.2d 206, 215 (2d Cir. 1966); *United States* v. *Buffalino*, 285 F.2d 408, 416 (2d Cir. 1960). As this Court stated in *Blumenthal* v. *United States*, 332 U.S. 539, 559-60 (1947): "[E]ven at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely." The enclosed chart (Figure 1; Appendices C and D) showing the chameleonic limitations put on the evidence by the court, demonstrates the charade of pretending that the jury is a computer.

Any presumption that the jurors could keep straight the limitations on evidence must totally vanish when one considers the fact that the Commonwealth was allowed to argue the case to the jury as though there were no limitations on the evidence at all. (1 Tr. 7128, 7141.) The confusion that must certainly have been in the jurors' minds was immeasurably compounded by that procedure.[15] Yet, the court below held:

> "... [I]t is highly improbable that the jury could or did remember all the limitations on all the evidence, but to return a guilty verdict against a defendant it was necessary that they remember only the limitations on that part of the evidence which was critical to sustain a conviction against that defendant .... There is no indication that the jury could or did not comprehend the limitations. 'We see no reason to depart from our rule that jurors are expected to follow instructions

[15] Petitioner took exception to the refusal of the court to instruct the jurors that if they were uncertain as to what evidence might be considered against a defendant, they must return a verdict of not guilty against that defendant.

to disregard matters withdrawn from their consideration.'" Appendix A, page A-123.

The court below said in effect that the verdicts of guilty demonstrated that the jury had been sufficiently inclusive, and that the court would assume that it had been properly exclusive, though recognizing it was highly improbable that it could have been so. This does not comply with the requirement that the jury treat each defendant in a joint prosecution as if separately tried, considering "only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton* v. *United States*, 391 U.S. 123, 131 n. 6, 88 S.Ct. 1620, 1625 n. 6, citing *Blumenthal* v. *United States*, 332 U.S. 539, 559-560, 68 S.Ct. 248, 257.

Petitioner, like many before him, fell victim to the mass conspiracy trial.[16]

Of the testimony admitted against Petitioner, probably 99% consisted of the acts and statements of co-conspirators, and co-defendants who were not even co-conspirators. Yet Petitioner could not even call one of them to the witness stand to testify in his behalf, or even to claim the privilege against self-incrimination. And none of them voluntarily testified. Enmeshed in this net, Petitioner was entirely at the mercy of Heath with no possibility of assailing his testimony. See *Addonizio* v. *United States*, 10 Cr. L. 4181, 4182 (Mr. Justice Douglas, dissenting).[17]

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[16] It is noteworthy that since this trial Massachusetts has outlawed the joint trial of conspiracy and substantive indictments. G.L. (Ter. Ed.) c. 278, §2A.

[17] One particularly egregious piece of evidence testified to by Heath was that Glynn told Heath, that Barber had told Glynn that Barber had told McDermott (neither a co-conspirator nor a co-defendant) that Hanley had told Barber that Hanley wanted another $10,000, and that Glynn had told Heath that Barber had told Glynn that McDermott told Barber that he would not donate it. (1 Tr. 3917-3920.) (Admitted against Petitioner on Indictment Nos. 11,900, 11,910, and Count 2 of 12,032.)

Worse still, Petitioner was at odds with his co-defendants as to his defense. At one point in cross-examining Heath, the trial court excluded an important line of questioning upon objection of the co-defendants, not the Government. (I Tr. 5379.) While the question called for hearsay, it would have been admissible in the absence of objection. *Regan* v. *John J. Amara & Sons Co.*, 348 Mass. 734, 737, 205 N.E. 2d 705, 707.

Perhaps the most important demonstration of the problem of contradictory defenses occurred when the prosecutor warned defendant not to proceed with a particular line of questioning since it would open other areas of criminality. It was later discovered by Petitioner, that this criminality was not of Petitioner, but of his co-defendants. The prosecutor was clearly trying to prevent a mistrial as to other defendants.[18]

In addition, Petitioner was prejudiced by actions of his co-defendants, which he did not have the power to prevent.[19]

Many authorities have criticized the unfairness of multi-defendant conspiracy trials.[20] This trial demonstrates the validity of their criticisms, and resulted in the denial of Petitioner's constitutional right to a fair trial on evidence presented against him, by witnesses confronting him, and free from the prejudice engendered by the acts and statements of others.

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[18] This point is treated more fully *infra*, pp. 27, 32.

[19] To cite only one example, counsel for one co-defendant stated in cross-examining Heath, "Let's take another look at this little Appalachia in New York, Mr. Heath . . . ." (I Tr. 4806.)

[20] Note, *The Challenge of the Mass Trial*, 68 HARV. L. REV. 1046 (1955); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959); Panel Discussion, *The Problems of Long Criminal Trials*, 34 F.R.D. 155 (1963); *Proc. of the Seminar on Protracted Cases*, 21 F.R.D. 395 (1957); Kaufman, *The Appalachian Trial*, 44 J. Am. Jud. Soc. 53 (1960).

3. The Prosecution's Suppression Of Material Evidence Worked A Denial Of Due Process Of Law.

During the trial the prosecution provided the defendants with certain portions of the grand jury and Crime Commission testimony of the witness Heath. He was, essentially, the prosecution's whole case, as was admitted in final argument: "... without Mr. Heath there is no question that you have no case." I Tr. 7127. Defense counsel specifically requested the remaining Heath transcripts, but the prosecution repeatedly said that what was disclosed were the only transcripts that had anything to do with the case on trial.[21]

It was obvious from one of the carefully excised portions of Heath's grand jury testimony that he had testified to additional comments supposedly made by this Petitioner during the all-important meeting at the Commodore in New York on October 17, 1962. Counsel for Petitioner and Liberty Loan Corporation demanded the excised portions, and the court so ordered, despite the fact that the Commonwealth represented that those portions dealt with other crimes unrelated to the 1962 rate board conspiracy. The missing portions were supplied *only* to this Petitioner and Liberty. From this additional grand jury testimony it appeared that at the very same Commodore meeting in New York at which Heath had testified at trial that Petitioner made a statement which the court ruled was an agreement to enter a conspiracy to bribe Hanley, Heath had previously told the grand jury that Petitioner had angrily refused to pay any money to Hanley! The prosecution then warned counsel for Petitioner and Liberty that if they cross-

[21] I Tr. 3359-3403, 3462-3506, 3617-3622; R. 4631. The Commonwealth specifically recognized its obligation to "obey the mandate of ... Brady ...." (P.T. Tr. 224), and the judge admonished the Commonwealth of the consequences of non-disclosure. (I Tr. 3502).

examined Heath regarding these apparently exculpatory portions of his grand jury testimony, it would result in evidence being brought out of other crimes of theirs. Counsel knew that there was one other indictment then outstanding against their clients which also charged them with a conspiracy to bribe Hanley on another matter allegedly also entered into at the Commodore meeting. None of Heath's grand jury testimony regarding that indictment had then been supplied to counsel. Because of the Commonwealth's warning counsel, of course, decided that they dare not cross-examine Heath about his apparently exculpatory grand jury testimony.

At the subsequent, so-called, "Second Small Loans Case" trial of that remaining conspiracy indictment against Petitioner and Liberty, Heath testified substantially in accordance with his previous apparently exculpatory grand jury testimony: that rather than join a conspiracy to bribe Hanley at the Commodore meeting, Petitioner had angrily refused to pay any money to Hanley. No other incriminating evidence was introduced, and after six months of trial Petitioner and Liberty obtained directed verdicts. All the other defendants convicted in the first trial went on to be convicted in the second.

At the hearing on the motion for new trial which alleged a denial of due process occurred when the Commonwealth misrepresented to Petitioner and Liberty the consequences of cross-examining Heath on the apparently exculpatory grand jury testimony, the prosecutor testified that the other criminality he had had in mind dealt not with the remaining indictment on which Petitioner and Liberty were subsequently acquitted, but a *third* conspiracy to bribe Hanley. That provided the court below sufficient basis to find that no misrepresentation had been made, undeterred by the fact that Petitioner and Liberty were never indicted on that third conspiracy (other petitioners were) and, further, that

no evidence of Petitioner's or Liberty's criminality came to light at the second trial when the exculpatory evidence was fully examined into![22]

During the second trial defense counsel were provided additional portions of Heath's grand jury and Crime Commission testimony which they were not given at the first trial, and learned for the first time that at Heath's last appearance before the grand jury, only seven months before trial, he did not name Petitioner as even being present at the Commodore meeting in New York, much less have him say anything. Counsel also learned of Heath's recounting a 1957 conversation with Petitioner in which he said Petitioner told him that if Hanley did not take proper action on legitimate business requests of Liberty that legal action would be taken against Hanley, and that Heath as Hanley's friend might thereby be harmed. Heath at the time of his testimony, seven years later, felt that this was an attempt by Petitioner to "blackmail" him. Heath also inadvertently disclosed in testimony, and counsel then obtained, Heath's expense vouchers covering the time of the conspiratorial meetings he had testified about at the first trial. The very detailed vouchers contradict the fact that any of the incriminating Boston meetings took place. The prosecutor testified at the hearing on the motion for new trial that he had made "a conscious, intentional decision not to produce this evidence." Heath testified that he was "promised that expense vouchers would not be used in this case."

Petitioner and Liberty argued to the trial court and to the Supreme Judicial Court that the suppression of the vouchers, the two portions of grand jury testimony, and the misrepresentation of the consequences of cross-exam-

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[22] It is patent that the misrepresentation was made not out of the prosecutor's solicitude for Petitioner or Liberty, but to obviate the mistrial which would have resulted when evidence of the *other* defendants' criminality came out—yet another facet of the severance argument advanced herein.

ining on the apparently exculpatory testimony all violated the fundamental right to due process of law, citing *Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83 (1963); *Napue* v. *Illinois*, 360 U.S. 264 (1959). Beyond argument, it was proven that there was a "suppression by the prosecution" "of evidence favorable" to Petitioner, for which there had been a "request," "irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, *supra*, at 87. The only possible question, argued Petitioner, was whether under the *Brady* rule the suppressions were "material."

Strangely, complaining of "this unsettled state of the law," the court below, in one of the more oblique portions of its opinion, held that the suppressions were not "material" and, therefore, there had been no denial of due process. Petitioner submits that this was error, and that any one of the suppressions objected to was a denial of due process in the light of the evidence adduced against him. Recall that Petitioner's guilt turned fragilely on a single sentence Heath alone ascribed to him. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence. . . ." *Napue* v. *Illinois*, *supra*, at 269; *See*, *Giglio* v. *United States*, —— U.S. ——, ——, 92 S. Ct. 763, 766 (1972). ". . .[T]he smallest feather of a palpable exaggeration or an inconsistency in a witness' statement on a minor point may be the very item to tip the scales and discredit the witness on his main testimony." *Commonwealth* v. *Smith*, 417 Pa. 321, 208 A.2d 219, 225-226 (1965). These suppressions, given the evidence, were hardly feathers.

Had counsel not been warned off by the prosecution in a situation where it would have been madness to ignore the warning, the jury would have been able to consider whether it was likely that Petitioner would have agreed to bribe Hanley one moment and angrily refuse the next. His

open antagonism toward Hanley would indicate no desire to "influence" Hanley in any way. This argument would have also been substantially supported had the testimony of the "blackmail" incident been known, with Petitioner's threat that if Hanley did not act properly, Liberty was "going to taken Hanley to court." All strong evidence contrary to any disposition of Petitioner or Liberty to bribe Hanley and suggesting that the statement Heath attributed to Petitioner, if made by anyone, had not been made by him. Further support would have been provided had Heath's grand jury testimony only seven months before trial not been suppressed: how reliable was Heath's trial testimony when before the grand jury he had not even named Petitioner as one of those at the Commodore meeting, let alone ascribe to him the one incriminating sentence adduced at trial. The "blackmail" incident, proof of a grudge Heath bore for seven years, would have provided reason to influence his memory and put Petitioner in the crime with the one sentence. Evidence of that incident would have been of further value: to contradict Heath's trial testimony that all the individual defendants were his friends and that he was on "cordial terms" with Liberty personnel. Finally, the suppressed expense vouchers would have severely impeached Heath's credibility on several incriminating meetings he testified about. While testimony of those meetings was not introduced against Petitioner or Liberty, even if the jury somehow recalled those restrictions, *any* evidence which affected Heath's credibility would clearly and fundamentally have benefited Petitioner.

It is incomprehensible how the court below could have avoided recognizing this fundamental constitutional error by characterizing this suppressed evidence as "marginally useful," "not material," "of only minor importance," or Petitioner's argument "the idle luxury of hindsight."

4. It Was A Denial Of Due Process Of Law To Consider Evidence Not Admitted Against Petitioner To Uphold His Conviction.

The sole evidence concerning this Petitioner was that of the meeting at the Hotel Commodore on October 17, 1962. It is clear from that meeting that insofar as there was any agreement, it was an inchoate agreement that each participant would present the issue to his home office for approval. The court below recognized that "[i]t could hardly be expected that any of the individual defendants would conspire to pay, or would pay, the substantial amount of money here involved ... out of his own pocket.... [T]he disbursal of such an amount of money would come from the corporate treasury." (Appendix A, p. A-81.)

Heath testified that at that meeting he had no authority to enter into such an agreement on behalf of American, and that he had never had such authority in his 38 years with American, even during the period when he was an executive vice president, since he was always in the "lower echelon." (I Tr. 5464-5465, 4603, 4604, 4732, 4793.) He testified that Godshall of Family and Thomasch of State specifically stated that they would have to report back to their companies. (I Tr. 3774-3775.) He testified that neither Pratt nor Glynn had authority to commit their companies (Household and Beneficial). (I Tr. 4603-4604). He testified that Farrell stated that he would contact other companies about the matter. There was no testimony *aliunde* against Woodcock concerning the authority of Farrell and Barber, the only other men at the meeting, except Heath's testimony that those in his position were not in the upper echelons where the commitments must be made.[23] (I Tr. 4564-4565, 4603-4604, 4732, 4793).

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[23] There was testimony, not admitted against Woodcock, concerning the higher officials of Household, who were not at the meeting.

The court below, in discussing this issue (Appendix A, page A-57), referred to the portions of its opinion dealing with corporate liability to establish individual authority. But that approach was not properly applicable to this question, since the evidence on which those findings were based was never admitted against Woodcock at any stage of the trial.[24] It has always been the clear rule in Massachusetts, as elsewhere, that only evidence admitted against Woodcock can be considered against him. *Commonwealth* v. *Kurth*, 1971 Mass. Adv. Sh. 1117, 1118, 1123-1124, 271 N.E. 2d 349, 350, 353; *Commonwealth* v. *Stasiun*, 349 Mass. 38, 206 N.E. 2d 672. Considering evidence not admitted against Woodcock to support a denial of a motion for directed verdict must be considered a denial of due process of law, as it violates the essence of fairness.[25]

It is irrelevant to this argument whether there was sufficient evidence of Woodcock's authority to enter into a conspiracy.[26] Assuming there was, there must also be evidence admitted against Woodcock that showed that at least one of the other men at the meeting had authority. There was none. Therefore, there was no evidence of conspiracy, and Woodcock could not be convicted in accordance with due process of law. *Fields* v. *City of Fairfield*, 375 U.S. 248, 84 S. Ct. 360; *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248; *Thompson* v. *Louisville*, 362 U.S. 199, 80 S. Ct. 624.

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[24] See Appendix A, pages A-35 to A-42, notes 12 to 30.

[25] This was argued to the court below in a petition for rehearing which was denied. (Appendices F, G.)

[26] There was abundant evidence of subsequent acts and statements of some of the codefendants that showed that they and their companies did ultimatly consummate the conspiracy. But there is not one word of testimony concerning acts or statements of Woodcock or anyone else from Liberty. It is entirely consistent with the evidence that Woodcock reported the discussion to the president and the board of directors of Liberty, and the decision was made that Liberty would not participate. Indeed, no other conclusion could be reached, given the presumption of innocence coupled with the complete lack of subsequent involvement. (There could have been no prior authorization, since the original purposes of the meeting were entirly proper.)

5. The Court Below Improperly Applied Ex Post Facto A Statute That Was Passed More Than A Year After The Trial Had Been Completed In Order To Affirm Petitioner's Bribery Conviction.

Petitioner was convicted on Indictment No. 12032, which charged that he was a principal to the offense of bribery, which is a felony in Massachusetts.[27] Prior to 1968, a defendant in Massachusetts who was charged as a principal to a felony could not have been convicted on evidence that proved him to have been an accessory before the fact. *E.g., Commonwealth* v. *DiStasio,* 297 Mass. 347, 356-358, 8 N.E. 2d 923, 929. In 1968, Mass. G.L. (Ter. Ed.) c. 274, §2, was amended to read:

> "Whoever aids in the commission of a felony, or is an accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be indicted, tried and punished as a principal."

The new statute makes applicable to felony cases a rule that before 1968 was applicable only to misdemeanors. *Commonwealth* v. *Park,* 1 Gray (67 Mass.) 553, 554.

In *Commonwealth* v. *Benjamin,* 1971 Mass. Adv. Sh. 141, 146-149, 266 N.E. 2d 662, 667-668, the Supreme Judicial Court held that the new statute applied retroactively to felonies committed prior to the passage of the statute. That case arose on the Government's appeal from dismissals of indictments before any trial had been held.

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[27] The substantive indictment, No. 12032, charged Petitioner with a felony, in violation of Mass. G.L. (Ter. Ed.) c. 268, §7 (repealed by St. 1962, c. 779, §3, effective May 1, 1963. The alleged bribe was offered prior to May 1, 1963.) Mass. G.L. (Ter. Ed.) c. 274, §1, reads: "A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors." Petitioner was sentenced to serve three years in the state prison on this indictment.

Petitioner's trial was completed in December of 1966, more than a year before the statute was passed, yet the opinion of the court below can only be read as imposing the new statute retroactively. This petition raises the question whether the imposition of the new statute retroactively, not only to the date of the alleged offense but even to a completed trial, is a violation of the prohibition against *ex post facto* laws. Constitution of the United States, Art. 1, §9, cl. 3; Art. 1, §10, cl. 1.

There was no evidence in this case that Woodcock, or any one else in any way connected with Liberty, did or said anything whatsoever prior or subsequent to the alleged formation of the conspiracy at the October 1962 meeting at the Hotel Commodore. The court below, however, held that the evidence "shows that the defendants specifically delegated to one of the co-conspirators, namely Barber, the authority to offer a bribe to Hanley. One may be convicted as a principal where he delegates to an agent the authority to do the act. See *Commonwealth* v. *Dolan*, [sic] 304 Mass. 325, 339."[28]

Under the law as it was prior to the amendment, there was no distinction between principals and accessories before the fact where *misdemeanors* were concerned. *Dolan* v. *Commonwealth*, 304 Mass. 325, 339, 23 N.E. 2d 904, cited by the court below, concerned a misdemeanor. The case relied on in *Dolan* is *Commonwealth* v. *Park*, 1 Gray (67 Mass.) 553, 554, where the court said: "But it is a general rule, in civil actions and in prosecutions for *misdemeanors*, that when a declaration or indictment alleges that a person did an act, such allegation is sustained by proof that he caused it to be done by another." (Emphasis added.) The *Park* case concerned a conviction for a misdemeanor for an unlawful act of an agent.

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[28] Appendix A, page A-136. The correct citation is *Dolan* v. *Commonwealth*, 304 Mass. 325, 339, 23 N.E. 2d 904, 913.

The court below, in relying on the *Dolan* case, demonstrated that it was applying the rule for misdemeanors, now applied to felonies by the new statute, to this case *ex post facto*.

That this new rule was applied here is manifest by numerous cases, which hold that one who procures a guilty agent to commit a felony, but does not himself participate in the criminal act, is an accessory before the fact. Chief among them is *Commonwealth* v. *French*, 1970 Mass. Adv. Sh. 619, 259 N.E. 2d 195. There the court found one Limone guilty as an accessory before the fact to a murder on evidence showing that he initiated the murder and hired one Baron (also a co-conspirator) to commit it. Certainly, Baron was as much an agent of Limone as was Barber an agent of Woodcock.

In *Commonwealth* v. *Doherty*, 353 Mass. 197, 203-205, 229 N.E. 2d 267, the court held that the defendant could have been found to have procured the murder directly, requesting the murderer to come to the scene with his gun, and at the scene pointing out the intended victim to the murderer. He was held as an accessory before the fact.

Here, the court below held that Woodcock made Barber his agent to carry out the offense. If that is true, then Woodcock could not have been found to have been a principal prior to the passage of the 1968 statute.

In the *Benjamin* case, the court below held "that the 1968 statute made only procedural changes . . . ." 1971 Mass. Adv. Sh. at 148, 266 N.E. 2d at 668. But in *Calder* v. *Bull*, 3 Dall. 386, 1 L. Ed. 648, Mr. Justice Chase stated that one of the four categories of violations of the *ex post facto* clause includes,

> "every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law re-

quired at the time of the commission of the offense, in order to convict the offender."

There is no question here but that the evidence required to convict Petitioner as a principal is very different from that required to convict him as an accessory before the fact. This was a patent violation of the prohibition against *ex post facto* laws.[29]

The error in this case is made even more egregious by the fact that the new statute was applied to a case that had been completed so long before the statute was passed. Counsel at trial had no way of anticipating the change, and, of course, defended the case in reliance upon the law as it then stood. They argued the point in motions for directed verdict, requests for instructions to the jury, exceptions to the instructions given, assignments of error, and on appeal. The Commonwealth never even suggested that the new statute should apply to this case. Totally surprised by the result, Petitioner sought a rehearing on this issue, which the court below denied. (Appendices F, G.) Even if the statute could be held validly retroactive to cases not yet tried, such as *Commonwealth* v. *Benjamin, supra*, it must be a denial of due process to apply it to a case in which the trial had been completed.

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[29] In this case there was no evidence that would make Petitioner even an accessory before the fact. The law has been that a co-conspirator cannot be convicted of a substantive crime committed by another co-conspirator, unless the evidence showed at least some direct participation in the commission of the actual offense. *Commonwealth* v. *Perry*, 1970 Mass. Adv. Sh. 389, 256 N.E.2d 745; *Commonwealth* v. *Stasiun*, 349 Mass. 38, 47-49; 206 N.E. 2d 672, 678-679; *Commonwealth* v. *DiStasio*, 297 Mass. 347, 8 N.E.2d 923. In the *Perry* case, the court held that one who conspired with others to rob a liquor store, who went with them, and who waited about 400 feet from the scene of the robbery as planned, could not be found guilty either as a principal or as an accessory before the fact to the robbery. It is impossible to distinguish that case from our case.

CONCLUSION

For the reasons set forth above a writ of certiorari should issue to the Supreme Judicial Court for the Commonwealth of Massachusetts.

Respectfully submitted,

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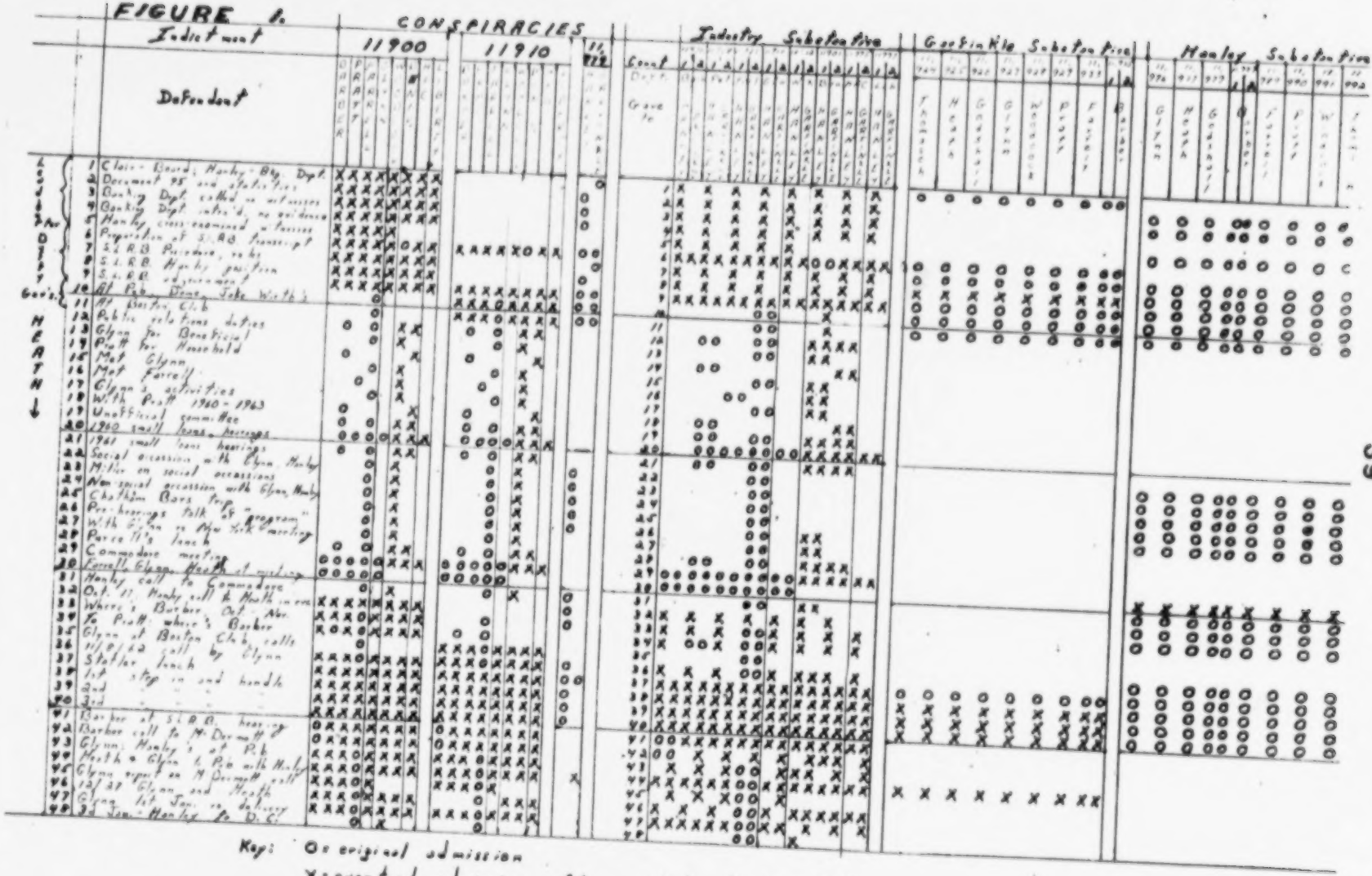
FIGURE 1.


Indictment
Defendant
CONSPIRACIES
11900
11910
Industry Sabotage
Gambling Sabotage
Hanley Sabotage
Count
Date
Grave
Key: O = original admission
X = eventual admission after removal of limitations

APR 1 1972

In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1253
71-1254

LYLE S. WOODCOCK,
and
LIBERTY LOAN CORPORATION,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

JOINT APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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APPENDIX A

THE COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
SUFFOLK COUNTY 1971 SITTING

No. 14,584
No. 14,585

COMMONWEALTH
v.
BENEFICIAL FINANCE COMPANY & OTHERS

OPINION

SPIEGEL, J. We have before us appeals emanating from 2 separate series of indictments and 2 separate jury trials of various individual and corporate defendants.

All of these appeals were taken under G. L. c. 278, §§ 33A-33G, and are before us because of the convictions of a number of individuals and corporations. The corporations convicted in the first trial were Beneficial Finance Company (Beneficial), Household Finance Corporation (Household) and Liberty Loan Corporation (Liberty). The individuals convicted in the first trial were John M. Farrell, Francis T. Glynn, Nathaniel W. Barber, James S. Pratt, Lyle S. Woodcock, Morris Garfinkle and Martin J. Hanley. In the second trial the corporate defendants convicted were Beneficial, Household and Local Finance Corporation (Local). The individuals convicted in the second trial were Hanley, Farrell, Glynn, Barber, Pratt and Edward R. Newhall.

These cases have become generally known as the "small loans" cases. In each case the defendants were charged with various offences under numerous indictments returned in 1964 by a special grand jury. The offences charged were

offering or paying, or soliciting or receiving, bribes, or conspiring to do so.[1] These indictments were presented to the special grand jury as a result of an investigation developed by the Massachusetts Crime Commission (Commission). The Commission was specifically created by the Legislature "to investigate and study as a basis for legislative action the existence and extent of organized crime within the Commonwealth and corrupt practices in government at state and local levels." Resolves of 1962, c. 146, approved July 27, 1962.

Some insight into the sheer detail involved in reviewing the proceedings may be gleaned from the fact that "[p]re-trial motions on these indictments were heard for sixty-five court days ending May 9, 1966. The transcript of the pre-trial proceedings covers 4,730 pages. The decisions disposing of the various motions cover almost 700 pages . . . . [After hearing the judge made extensive findings and rulings on the pre-trial motions.] Forty-nine of the indictments were grouped for [the first] trial which began on July 18, 1966. The trial lasted about five months and generated a voluminous record." See *Barber* v. *Commonwealth*, 353 Mass. 236, 237-238. The transcript of evidence consists of 103 volumes containing more than 7,500 pages.

The evidence in the first trial, pertinent portions of which we summarize in detail later in this opinion, is here synopsized. This evidence tends to show that during the year 1962, several licensed small loans companies (corporate defendants), together with certain of their officers and employees (some of whom are defendants), conspired to bribe Hanley and Garfinkle in their capacities as public officials. The purpose of the alleged conspiracy and the payment of the bribe money was to insure the maintenance of a maximum inter-

[1] A chart listing the defendants as well as other individuals and corporations involved in the first and second trials, together with the numbers of the indictments, the disposition thereof, and the status of appeal is appended hereto and marked Appendix B.

est rate which companies licensed to do business in the Commonwealth were permitted to charge. Hearings on this matter were conducted by the Small Loans Regulatory Board (Rate Board) in 1962 and the bribe money allegedly paid to Hanley was intended to "fix" the results of these hearings.

The second trial began on July 17, 1967, and required 222 trial days (over a period of about 12 months). Twenty-one of the indictments were grouped for the trial. The transcript of this trial consists of 223 volumes containing more than 11,800 pages. Collectively (pre-trial and both cases), the defendants took more than 5,400 exceptions and assign about 700 numbered multiple assignments of error. The findings, rulings and decisions of the judge (covering all proceedings) contain more than 1,400 printed pages.

The evidence in the second trial, set out in detail in the subsequent portion of this opinion, tends to show that over a period of some 7 years (1957-1963) a number of small loans companies (including the corporate defendants), together with a number of their officers and employees (including the individual defendants named in the conspiracy indictment), allegedly conspired to bribe Hanley. His office as a public official clothed him with extensive powers to approve or disapprove the activities of small loans companies doing business in the Commonwealth. The bribes were alleged to have been paid to Hanley over this period to induce Hanley (1) to approve various requests pertaining to routine matters; (2) to refrain from taking action adverse to certain of the defendants and co-conspirators at rate hearings held during 1957; and (3) to obtain approval of various changes in small loans regulations.

Although these cases were argued consecutively, some of the issues involved necessarily overlapped. The pre-trial issues in both cases were argued jointly. In the interest of lucidity and conciseness this opinion consists of 3 parts.

First, we treat with the pre-trial issues raised by all or some of the defendants whether in the first or second trials. Subsequently we deal with specific issues raised in the first trial and finally with issues raised during the second trial.[2]

Prior to dealing with the issues involved in these appeals, we believe it to be opportune and fitting to make some general observations.

Many of the exceptions are but conglomerate fragments which are obviously of little, if any, merit but in any event are not worthy of discussion and would merely serve to needlessly clutter this opinion. Others present a facade of substantial issues, but when considered in depth, present no problem requiring our comment. Others may show some technical error but are, at best, harmless. We have endeavored to consider and to give scrupulous attention to every assignment of error argued by the defendants. If some assignment of error is not specifically referred to in this opinion, a conclusion that we did not reflect on it would be far from accurate. We recognize the formidable task facing defendants' counsel, as well as the prosecution, in arguing these appeals. We commend counsel for the defendants, as well as counsel for the Commonwealth, for the excellence of their briefs and their obvious devotion to the task confronting them. The briefs filed and the oral arguments of counsel were noteworthy and of valuable assistance to us in the writing of this opinion.

In the case of *Barber* v. *Commonwealth*, 353 Mass. 236, 239, we indicated that defendants' counsel were vigilant throughout a lengthy first trial in their efforts to protect the rights of the defendants. This has been equally true throughout the second trial. However, it should be borne in mind that although "a defendant is entitled to a fair trial.

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[2] A table of contents listing each issue discussed in these 3 sections and referring to the discussions by page number is appended hereto and marked Appendix A.

he is not guaranteed a perfect one. *Root* v. *Cunningham*, 344 F. 2d 1, 3 (4th Cir.). *Johns* v. *Smyth*, 176 F. Supp. 949, 952 (E. D. Va.)." *Barber* v. *Commonwealth*, *supra*, at 240.

PART I.

Pre-Trial Issues.

All but two of the pre-trial issues raised have been argued extensively by Household. The other defendants in many instances confined their arguments to an adoption of Household's. For this reason, these issues may be most efficiently dealt with by treating with them as argued by Household, listing for each issue the other defendants who have adopted Household's argument on the specific issue. We deal finally with the pre-trial issues which have been raised separately by other defendants and which are not covered in the Household brief.

Household raises 3 issues attacking the validity of the indictments because of the various aspects of the method by which evidence was presented to the special grand jury.

1. The first of these is the allegation that "[t]he indictments were invalid because legislative agents, paid by legislative funds, utilized a legislative investigation to prepare and develop a case for presentation to the special grand jury and then presented that case in violation of [art. 30 of] the Declaration of Rights." Beneficial, Liberty, Local, Barber, Pratt, Glynn, Farrell, Woodcock and Newhall have all adopted Household's argument on this point. It was raised in the pre-trial proceedings by motions to dismiss filed by 6 corporate defendants. The judge heard 17 witnesses and admitted in evidence 26 exhibits relative thereto. He made extensive findings of fact and rulings of law and denied the various motions.

First, Household argues that at the time of its investigation into the small loans companies the Commission was preoccupied with law enforcement rather than remedial legislation to an extent that was in derogation of art. 30 and

its mandate "to investigate and study *as a basis for legislative action*" (emphasis supplied). This objection was raised in the case of *Gardner* v. *Massachusetts Turnpike Authy.*, 347 Mass. 552. There, the respondents cited the Third Report of the Commission (cited also by Household here) in support of a similar contention. We rejected it, holding that "[t]he practice of the Commission as to use of the evidence to convict wrongdoers does not take its program outside the resolve [expressly authorizing the Commission to submit evidence to the Attorney General or other law enforcement agency] or violate art. 30 . . . . [W]e think that the respondents show no more than a commission determined to be effective in its assigned legislative task of the discovery of corruption in government and, in connection therewith, rightly and lawfully dealing with evidence of corruption which that task brings to light." P. 558. Similarly, in the case of *Commonwealth* v. *Favulli*, 352 Mass. 95, 101-102, we held this same report consistent with the Commission's legislative function.

Household argues that these cases are not dispositive because it has presented the court with much more evidence of "the Commission's drive to expose, indict and punish" than was present in the records of those cases. However, the evidence to which it refers (statements from Commission reports and from the minutes of the Commission meetings, as well as statements made by the Chairman of the Commission under various circumstances) was also cited to the judge. They are contained or referred to in the judge's findings of fact. In dealing with them he noted that the statements, taken in context, "are coupled with further language which indicates clearly that the Commission recognizes that it has no power or authority to conduct criminal prosecutions, that such power and authority is vested in the Attorney General, and that it is speaking in terms of cooperating with the Attorney General in submitting evi-

dence of criminal activity to him for his decision whether he will prosecute." On this basis the judge concluded that "[t]he Commission never stated, contended, or took the position that it had the authority, power, or duty to prosecute persons shown by its investigations to have committed crimes. . . . The Commission, which belonged to the Legislative Branch of the government of the Commonwealth, did not exercise, or attempt to exercise, any powers of the Executive Branch in the matter of the enforcement of the criminal laws, the prosecution of criminal offenses, or in any other matter." This conclusion is supported by the evidence as a whole and is dispositive of the issue of the claimed inconsistency between the Commission's concern with the indictment and conviction of lawbreakers exposed by its investigations and its primary legislative purpose.

Secondly, Household attempts to demonstrate that the Commission improperly dominated the grand jury proceedings through the medium of Mr. Simonds, who was simultaneously investigating the case as an agent of the Commission while he presented the evidence to the grand jury as a special assistant attorney general. The findings of the judge on the conduct and control of the grand jury proceedings, however, clearly bring this point within the holding in *Commonwealth* v. *Favulli*, 352 Mass. 95, 102-103, that participation of the Commission in grand jury proceedings was not improper as long as control remained in the Attorney General. These findings establish, as in the *Favulli* case, that the decision to present the matter to the grand jury was that of the Attorney General and that he at all times "conducted and controlled the presentation of this case to the Special Grand Jury." The judge found that the Attorney General exercised this control through his assistants Mr. Skinner and Mr. Travers, the latter being directly in charge. The function of Mr. Simonds, as special assistant to the

Attorney General, was only "[to assist] to the extent required by [Mr.]Travers."

Since the relevant question is *power* and not *participation* and since the judge's findings establish that *power* with respect to the grand jury proceedings rested at all times in duly authorized members of the Executive Branch other than Mr. Simonds, there is no significance in a possible "merger of the powers" in the person of Mr. Simonds. Furthermore, any such inference is precluded by the judge's finding, amply supported by the evidence, that Mr. Simonds's appointment as a special assistant attorney general "was an appointment in fact and in law; and it was not a sham to enable the Crime Commission to present evidence directly to a Grand Jury." "In appearing before the Special Grand Jury, [Mr.] Simonds did so as a Special Assistant Attorney General, under the direction and control of the Attorney General; and not as counsel for the Commission."

2. The second issue raised by Household is directed at the grand jury proceedings in that "the indictments should have been abated because of the presence of an excessive number of prosecutors while the Special Grand Jury was deliberating and voting and because of the conduct of the prosecutors during such deliberations." Beneficial makes a similar argument, while also adopting that of Household. Liberty, Barber, Woodcock and Pratt have likewise adopted Household's argument. The issue was raised by pleas in abatement (filed separately by Household and certain individual defendants), focusing respectively on the presence and conduct of the prosecutors.

Motions to dismiss the indictments filed by certain corporate defendants also raised this issue in addition to the issue previously treated with by us. The assignments of error which raise this point are directed to the judge's 2 decisions on the pleas in abatement and his decision on

the motions. Each of these 3 decisions overruled so much of the various pleas and motions as rested on the grounds here argued by Household.

The facts as found by the judge in these 3 decisions relative to the presence and conduct of multiple prosecutors before the grand jury and the conclusions he drew from them are as follows. At all times during the grand jury deliberations and voting, which took place on May 7, 1964, and the next day, at least 2 or 3, and at most 5, prosecutors were present in the grand jury room. The 5 were the Attorney General, Assistant Attorneys General Travers, Skinner and Bachman, and Special Assistant Attorney General Simonds. All 5 had been present at some point during the presentation of evidence to the grand jury and each one of them, except Mr. Skinner, had participated at some point in the examination of witnesses, Mr. Travers and Mr. Simonds having played the leading roles in this process. The judge made findings as to the procedure followed in reading to the grand jury the 129 indictments, which had been prepared in advance by Mr. Simonds and Mr. Travers, and in having them signed by the Attorney General. The judge concluded that "the number of prosecutors present before the Special Grand Jury at any one time during its hearings, deliberations, and voting was no greater than was necessary. All of the prosecutors who were thus present were there in their official capacities, discharging their public duties in connection with this case, and their presence before the Special Grand Jury was necessary at all times when they were present." He then held that the grand jurors were not intimidated, coerced, or influenced by the presence of the several prosecutors.

On the alleged impropriety of the conduct of the prosecutors before the grand jurors, the judge found that there was none. Since "[t]here is no law which requires

that a Grand Jury adopt a vote requesting a prosecutor to prepare an indictment before a prosecutor may do so," he ruled that it was proper for the prosecutors to draw up the 129 indictments in advance, as a means of assisting the grand jury in dealing with a very complex array of evidence. In presenting the indictments to the grand jury in groups of 15 to 20, he found that a prosecutor would refer the jurors to "the area of the evidence on which they were being asked to deliberate and consider the indictments being offered" and that it "was not a statement of what the evidence was or had been on that phase of the case, but it was a reference sufficient only for the jurors to identify the part of the case in connection with which they were being asked to consider the indictments. It was not a summation or argument on the evidence. It served only to identify that phase of the case on which the indictments were being offered from any of the other phases on which the jurors may have heard evidence over the preceding three months."

These findings, all of which are supported by the evidence and the conclusions drawn from them, are not erroneous as matter of law and are dispositive of the objections raised. The test we stated in *Commonwealth* v. *Favulli*, 352 Mass. 95 (decided after these findings were made), regarding the circumstances under which multiple prosecutors may properly be present before the grand jury applies equally to presence at the voting stage as to presence during presentation of the evidence and deliberations. The distinction Household attempts to make between voting and the other stages is not supported in our law. Indeed, in the *Favulli* case, as here, it appears that multiple prosecutors were present while the grand jury voted. The "controlling principle," we articulated there, is that "[t]he prosecutor has discretion as to the use of assistants and . . . may have present from time to time such reasonable number as he deems

appropriate." P. 106. Under this standard the finding of the judge that "the number of prosecutors present before the Special Grand Jury at any one time. . . was no greater than was necessary" clearly negates the contention that an improper number was present.

The *Favulli* case also states the "controlling principle" to be applied to the conduct of prosecutors: "In presenting cases to the grand jury the prosecutor and his assistants must scrupulously refrain from words or conduct that will invade the province of the grand jury or tend to induce action other than that which the jurors in their uninfluenced judgment deem warranted on the evidence fairly presented before them." P. 106. The findings of the judge, although not worded in precisely these terms, clearly establish compliance by the prosecutors with this standard in their conduct before the grand jury. His conclusions are likewise consistent with our earlier holding in *Attorney Gen.* v. *Pelletier*, 240 Mass. 264, 310, a case of extreme and clearly improper conduct by a prosecutor, that a prosecutor present during grand jury deliberations "cannot participate in the deliberations or express opinions on questions of fact or attempt in any way to influence the action."

3. Having argued the foregoing 2 issues Household further maintains that "[t]he record as a whole demonstrates that . . . [it], and others similarly situated, have been denied the equal protection of law guaranteed by both the Federal and State Constitutions." Liberty, Barber and Pratt adopt Household's argument on this point. This identical point was raised by various defendants in seeking amendments to pleas in abatement and in their challenges to the array of grand jurors. After a hearing on the pleas and challenges in their entirety, with particular reference to the alleged violation of constitutional rights, the judge ruled that "there was no such denial of the constitutional rights of any of such defendants."

The evidence at the hearing consisted of a stipulation entered into by the parties which contained specified portions of evidence previously introduced at certain hearings on particular issues raised by the pleas, plus certain documentary items. In ruling on the issues raised the judge did not make separate findings of fact or rulings of law. He relied instead on findings of fact made by him in 8 previous decisions on specific issues raised by the various pleas, and on portions of his findings of fact made in his decision and order on motions to dismiss the indictments. In addition the judge referred to his findings of fact and rulings of law in other decisions on various pleas in abatement "which may relate to the constitutional issues now under consideration." These adequately disposed of the constitutional objections raised, without requiring further discussion on our part.

In their argument before us the defendants have centered their constitutional objection on 8 aspects of the grand jury proceedings. Five of these are embodied in the 2 issues raised by them dealing with the grand jury proceedings which we have considered above. The other 3 aspects of the proceedings objected to by the defendants are the fact that Mr. Simonds revealed to personnel of the Commission, and to others, matters occurring before the grand jury; that, while acting as special assistant attorney general, Mr. Simonds continued to receive compensation from the Commission; and that the indictments were returned by a special grand jury sitting simultaneously with the regular grand jury for Suffolk County. The first 2 of these latter 3 objections were disposed of as separate issues by the judge in his decisions on pleas specifically raising these issues which were incorporated by reference in his decision on the constitutional questions raised by the pleas in their entirety. The findings of fact contained therein are supported by the evidence, and the rulings of law drawn from them are devoid of error.

The only objection that remains is the one directed at the simultaneous sitting of a special grand jury and a regular grand jury. The permissibility of this practice varies from State to State, depending on their relevant statutory and constitutional provisions, but it presents no Federal constitutional problem. *Commonwealth* v. *Favulli*, 352 Mass. 95, 107-108. We discovered no basis in this Commonwealth for objection to the practice.

Having disposed individually of the objections on which the defendants base their allegation of a constitutional violation, we cannot see that they gain any additional strength by cumulation.

4. Household focuses its pre-trial objections on an even earlier stage in the proceedings: the selection of the special grand jury which returned the indictments. Household raises 2 objections to the procedure used, the first being that "the jury lists from which the jurors were drawn were prepared in violation of the requirements of the statutes of this Commonwealth and of the Constitution[s] of the United States and this Commonwealth." Household's argument, which is directed also at the array of petit jurors in the 2 trials, has been adopted by Beneficial, Liberty, Local, Barber, Pratt, Glynn, Farrell, Woodcock, Hanley and Newhall. It was raised on numerous occasions by Household and other defendants prior to and during both trials by pleas in abatement, challenges to the array of grand and petit jurors, challenges to the panel of talesmen, motions for a lawful jury, and motions to discharge venire, all of which were unsuccessful. The judge on at least 1 occasion held a hearing on the factual allegations made therein. With respect to other pleas, the evidence was stipulated. Following a hearing held on certain "pleas in abatement and challenges to the array of grand jurors alleging that they were drawn from lists of registered voters in violation of applicable statutes," the judge made extensive

findings of fact, which are summarized below. Although these findings deal only with the procedure used to prepare the 1963 jury list for the city of Boston, from which 22 of the 23 members of the grand jury were picked, that procedure involves all the features which the defendants allege are in violation of statute and of the Federal Constitution in the drawing up of the lists from which the grand and both petit juries were chosen. No other procedure need therefore be detailed.

The 1963 jury list for the city of Boston contained about 9,000 names, of which about 3,000 were not carried forward from prior lists. To obtain these 3,000 names the Boston board of election commissioners (election board) started from the current list of registered Boston voters, containing 309,082 names, and picked 18,000 names from it according to a random selection process which is not here under attack. The names picked were then narrowed down to 3,000 by eliminating those exempted from service by G. L. c. 234, § 1; those over the age of 65 and under the age of 25;[3] women who requested to be excused under G. L. c. 234, § 4; Federal, State and county employees who requested to be excused; and others who so requested or for whom requests were made by public office holders on the ground of economic hardship.

The election board had available to it but did not use as a source for the jury list the 1963 police list for Boston, which contained the names of persons resident in Boston as of January 1, 1963, of age 20 or over who were not registered voters. The list contained 438,776 names, 129,694 more than the list of registered voters. Of these, the judge found that 11% (48,265) were not qualified to vote and therefore were ineligible for jury duty, without estimating the number in addition who were exempt from duty under

[3] Those under the age of 25 and over the age of 70 are exempt by G.L. c. 234, § 1.

G. L. c. 234, § 1. The election board used the voter list in preference to the police list because it felt that if the police list were used "it would result in a larger number or percentage of those summoned being rejected or eliminated for lack of qualifications to serve as jurors than would be the case if the list of registered voters were used."

First, Household argues that the election board's use of the list of registered voters as a source rather than the police list violated G. L. c. 234, § 1, as amended through St. 1949, c. 349, § 1, which provides in relevant part that, "A person of either sex qualified to vote for representative to the general court, whether a registered voter or not, shall be liable to serve as a juror." We agree with the judge, however, that § 1 is not mandatory and adopt his ruling that "[a]lthough c. 234, § 1, fixes the outer limits of the group of persons '*liable*' for jury service, it does not require or compel the persons charged with responsibility for preparing annual jury lists to include thereon persons from every group, class, or category of persons liable for jury service. . . . [A]lthough the Board did not avail itself of the largest group available, or of the longest list of names available, when it used the list of registered voters as the source of the names of persons placed on the 1963 Jury List, it did not thereby violate the applicable statutes."

Such a reading of § 1 does not make the 1924 (St. 1924, c. 311, § 1) amendment, which adds qualified but non-registered voters, "ineffective," as Household argues. The amendment permitted the election board, by drawing from such a pool, to compile a jury list containing names of people who before the amendment would have been ineligible to serve. Since 1967, the election board has in fact used the police list as its source for the jury list.

Secondly, Household argues that the election board's

elimination of 15,000 names from its list of 18,000 was improper because some people were automatically excluded who were not within the legally exempt categories listed in § 1, and some were excluded at their own request or the request of others for whose exclusion there was no statutory basis. However, the categories of exempt persons in § 1 are not preclusive. The defendants cannot complain that some public employees were excluded at their own request since they have shown no harm stemming from this practice. In addition, the judge specifically found that Federal, State, county and city employees were represented on the jury list. Nor was it improper to exclude some persons at their own request, or that of public officeholders, when, as the judge found, on adequate evidence, the reason for their exclusion was the economic hardship which jury service would entail.

In reducing the list from 18,000 to 3,000, there is no evidence that the election board abused the discretion clearly left to it by the statutory scheme. The statute does not mandate a specific procedure, but simply lists persons eligible and exempt, and from this group directs the election board to prepare a list of persons "of good moral character [and] of sound judgment" whom it determines to be qualified. G. L. c. 234, § 4, as amended through St. 1955, c. 38, § 1.

Finally, Household claims that the jury chosen as a result of the procedure used was substantially different in composition from that which would have resulted had it been drawn from the police list and had only those legally exempt or unsuited in character been excluded. For this reason it is argued that the procedure was constitutionally defective. This contention fails because, as the judge ruled, the defendants have not proved "that there has been any systematic or intentional exclusion of any economic, social, religious, racial, political, or geographical group in the

community."[4] *Ballard* v. *United States,* 329 U.S. 187, 195. *Hoyt* v. *Florida,* 368 U. S. 57, 59. *Swain* v. *Alabama,* 380 U. S. 202. *Young* v. *United States,* 212 F. 2d 236, 238 (D. C: Cir.). *Dow* v. *Carnegie-Illinois Steel Corp.* 224 F. 2d 414, 425 (3d Cir.). *Commonwealth* v. *Slaney,* 350 Mass. 400, 402. The notion that unregistered voters constitute such a class was rejected in *Gorin* v. *United States,* 313 F. 2d 641 (1st Cir.), in language which is thoroughly applicable to this issue and which was quoted at length by the judge. The mere fact that a different method of selection might have resulted in a jury made up somewhat differently in no way implies that the method used did not yield "a cross-section of the community," which is all that the Constitution requires. *Commonwealth* v. *Ricard,* 355 Mass. 509, 512. *Thiel* v. *Southern Pac. Co.* 328 U. S. 217, 220.

The judge determined that the elaborate statistical tables prepared from published lists by an expert for the defendants and designed to compare the composition of the 1963 jury list, the 1963 registered voter list, and the 1963 police list did not present sufficient evidence on which to base any findings on this point. It was within his discretion not to be convinced by these tables, no matter how carefully and accurately they may have been drawn as a matter of statistical analysis. In light of his extensive discussion of them in his rulings, we are unable to discern any substance to the argument that the judge dismissed them peremptorily.

Likewise, the judge acted within his discretion in refusing to admit similar tables based on interviews with persons not before the court. The defendants concede that the tables were based on hearsay evidence and can point to no statute or case in this Commonwealth requiring their ad-

[4] The further issues of whether the defendants have standing to raise this argument and whether they must, in any event, show prejudice need not be reached.

mission. The fact that some commentators have recommended admission of properly conducted surveys, and that some courts in other jurisdictions have admitted them, does not mean that the judge here was in error in excluding tables based on data from a private survey specifically conducted in behalf of the defendants.

5. Household's second objection to the selection of the special grand jury is directed at the questioning of prospective members by the probation department of the county of Suffolk and by the police of the city of Boston after their names had been drawn from the jury list by the election board. Household's argument that this procedure was in violation of G. L. c. 234, § 24, has been adopted by Liberty, Barber, Pratt, Glynn, Woodcock and Farrell. The issue as raised by "pleas in abatement based on alleged improper or unlawful questioning of prospective grand jurors," filed by Household and certain individual defendants. The judge held a hearing on the factual issues raised therein, after which he made findings, rulings and an order denying the various pleas.

The judge found the following facts regarding the questioning objected to, and the evidence is sufficient to support his findings. Each of the 28 prospective grand jurors drawn from the city of Boston received a "juror's identification card" from the probation department of the county of Suffolk asking for his name, address, age, date of birth and birthplace, occupation, height and weight, parents' names, and marital status. All these cards were received by the various jurors before they started to serve, with the exception of a card sent to one Joseph D. Casey. There was no evidence as to why these cards were sent out by the probation officer or what use was made of them.

In addition to the probation office, the police commissioner of Boston was supplied by the city clerk with a list of names drawn. The police thereupon made up for each

name a "Police Questionnaire" which inquired into the personal habits and character of the subject as well as routine statistics relative to him. These were eventually completed and returned to the office of the commissioner. Duplicate copies were kept by the commissioner and the originals were sent to the office of the district attorney for the county of Suffolk. Again, there was no evidence as to what use was made of the questionnaires, or whether any member of the Attorney General's office ever saw them prior to the hearing on the defendants' motions challenging the grand jury.

Eight grand jurors were visited and questioned by a police officer. Seven were asked only their name, address, marital status, business or occupation, name of employer, and, in some instances, whether they had previously served on a jury. Juror Casey was further asked as to his education, lodge affiliations, and political views. The judge found that all 8 had been questioned before they had received a summons under G. L. c. 234, § 24, notifying them that they had been drawn to serve as grand jurors. Three other members received telephone calls from persons asking similar questions, but there was no evidence as to the identity of such persons. The 11 members so called or visited testified that they had not been influenced thereby in their service as jurors. In addition the judge found that the above procedures involved no "intimidation or attempted intimidation" and that "no pressure or improper influence [was] brought to bear upon any such juror."

Household's objections are based on G. L. c. 234, § 24 (as amended by St. 1956, c. 278), which deals generally with individual notification of prospective jurors. The last sentence of § 24, added by St. 1956, c. 278, provides, that "[a]fter the service of such venire has been made, no person shall, except as otherwise provided by law, question any person so summoned for the purpose of obtaining in-

formation as to his background in connection with his jury duty." Assuming arguendo that this amendment applies to grand jurors as well as petit jurors (see G. L. [Ter. Ed.] c. 277, § 3), the objection raised is almost entirely obviated by the facts found by the judge and by his conclusion, "that the prohibition against questioning starts after a juror has been summoned" pursuant to the summons having been issued by either of the 2 methods detailed in the first part of § 24. We agree with the judge that this interpretation of the phrase "[a]fter the service of such venire," used as it is in conjunction with "any person so summoned," refers to "service of the venire on the municipality," and is more consistent with the language of § 24 than that which the defendants urge. As the judge noted, "At that time no juror has yet been drawn, and of course no person has been summoned to serve as a juror. Even after the municipality has made its drawing and listed the persons drawn to serve as jurors, there is no one who fits the statutory description of 'any person so summoned." It follows, therefore, and it was so held by the judge, that none of the juror's identification cards sent out by the probation office could have been in violation of § 24 with the exception of the card sent to juror Casey. Similarly, the questioning by the police was not in violation of § 24 because it occurred before notification of the jurors. Of the telephone calls allegedly made, only that to juror Spanoghe occurred after she was summoned under § 24.

Since the police questionnaires were not sent to the jurors and could not, therefore, constitute questioning of "any person so summoned,"[5] the sole questions left for

[5] The judge stated that he was not "condoning the practice," which seems open to question. Nonetheless, we are of opinion that it was not a violation of § 24. Since there is no evidence that the jurors (with 1 exception) were aware that such an investigation was being made, it is clearly not the kind of practice which tends to obstruct the honest and fair administration of justice and therefore is presumptively preju-

decision are whether the juror's identification card sent to juror Casey and the telephone call to juror Spanoghe were in violation of § 24.

The judge ruled that the identification card sent to juror Casey did not violate § 24 because the questions contained on it were not "for the purpose of obtaining information as to his background in connection with his jury duty," the only form of questioning prohibited by § 24. The judge concluded that the questions asked did not bear on juror Casey's "background in connection with his jury duty," since they sought only "information commonly required in all inquiries dealing with personal identity." We believe this conclusion is sound. It interprets the phrase "background in connection with . . . jury duty" in a way that is consistent with the purpose of the statute — to prevent inquiry which would tend to detract from the jury's impartiality. It follows, therefore, that the identification cards involved here are harmless and fall outside the prohibition no matter when they were sent.

With respect to the telephone call to juror Spanoghe, the judge made no finding as to what questions she was

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dicial, such as was treated with in *Sinclair* v. *United States*, 279 U.S. 749 (jurors shadowed during trial by private detective); *Gideon* v. *United States*, 52 F. 2d 427 (8th Cir.) (questionnaire sent to jurors with summons included question directly related to crime charged in the case); and *Cammer* v. *United States*, 223 F. 2d 322 (D. C. Cir.) (questionnaire sent by defendant's attorney to grand jurors who were Federal employees relative to effect of the government's loyalty program on them as grand jurors). The sole exception to this statement is juror Casey who was personally questioned by the police about his education, lodge affiliations, and political views and therefore was presumably aware of the more than rudimentary investigation being conducted by the police. Even in his case, however, the timing of the police questioning was such as to remove it from the statutory prohibition, and the cases in this Commonwealth are clear that such questioning is not in and of itself improper. *Commonwealth* v. *Cero*, 264 Mass. 264, 272-276. *Commonwealth* v. *Sherman*, 294 Mass. 379, 385-386. *Commonwealth* v. *Smith*, 350 Mass. 600, 602. These cases are not inconsistent with the Federal cases cited above dealing with practices which are so suspect as to warrant the presumption of prejudice.

asked. However, he made a subsequent ruling that the pleas were not legally sufficient, which is dispositive of that issue as well as of all the others raised by the questioning here involved. The ground for this ruling was that § 24 does not require as matter of law "that the return of an indictment by a Grand Jury . . . be declared invalid and set aside for the sole reason that a member of that jury was previously questioned in violation of § 24; absent, as in this case, any actual coercion, intimidation, or improper influence on the juror, and absent any impairment of the impartiality of the juror." Without expressing an opinion as to whether prejudice must be shown in every case, we agree that it must be shown where the statute has been violated by one who is not connected with a party adversary to the party protesting the violation. Since, therefore, the judge found that "there was no evidence from which any responsibility for . . . [the call to juror Spanoghe] can be placed on the Commonwealth or any of its public prosecutors," it cannot form a basis for abating the indictments, even if we should assume that it was in violation of § 24.

6. Household and several other defendants argue that the joinder of indictments in both the first and second trials was prejudicial to them and that their various pre-trial motions for severance should have been granted.[6] The groupings were as follows: Forty-nine indictments involving a total of 16 defendants were joined in the first trial. These contained conspiracy charges and substantive charges against several finance companies and individuals for bribing Hanley or, alternatively, Garfinkle; conspiracy

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[6] Other motions for severance were made during both trials after the judge had expanded the limitations on certain portions of the evidence to include certain defendants against whom such portions had not originally been admitted. The issue raised by these motions, which question the validity of expanding limitations in this manner, is dealt with in the conduct of the trial section of this opinion, *infra*, 102-103. To the extent that the defendants have raised this issue in connection with their pre-trial motions for severance, we deal with it here.

charges against Hanley and Garfinkle; and felony charges against Hanley and Garfinkle separately for requesting and accepting bribes. This grouping was the result of a motion for joinder filed by the Commonwealth. After hearing, the judge allowed the motion on March 25, 1966.

The joinder at the second trial was the result of a similar motion by the Commonwealth. This grouping consisted of 1 conspiracy indictment against 6 corporations and 8 individuals, 1 substantive indictment for bribery against Local alone, and 19 substantive indictments against Hanley relating to his requesting and accepting gifts and gratuities.

The defendants Household, Beneficial, Liberty, Woodcock and Local have severally argued a total of 4 grounds to support their contention that the joinder in 1 or both trials was improper, and that severance along the lines that they sought should have been granted. Barber and Pratt have adopted Household's arguments with respect to both trials. We deal seriatim with the 4 grounds raised, identifying with respect to each ground the defendants who have raised it.

The first ground alleged, as expressed by the defendants Liberty and Woodcock in their consolidated brief covering the first trial, is that "[t]rying the defendants with others on an indictment of conspiracy gave unfair tactical advantage to the prosecution in that a substantial amount of prejudicial evidence was presented to the jury which was inadmissible against these defendants." Local makes a similar argument with respect to the second trial grouping, alleging in addition that although other defendants were also prejudiced by the joinder Local should have a new trial even if the other defendants do not "because certain items of prejudicial evidence . . . were not only damaging in the extreme, but were also unique as to Local."

It is true that joinder of conspiracy indictments with substantive indictments allowed evidence to be admitted against some defendants which was inadmissible as to others. However, this fact is not in and of itself enough to compel severance. *Commonwealth* v. *Sacco*, 255 Mass. 369, 413. *Commonwealth* v. *Bingham*, 158 Mass. 169, 171. *Katz* v. *United States*, 321 F. 2d 7, 8 (1st Cir.). *Caton* v. *United States*, 407 F. 2d 367, 372 (8th Cir.). At the time of the trial, joinder of conspiracy and substantive indictments was permissible.[7]

Another ground urged is related to the one stated above. Liberty and Woodcock in the first trial, and Household in the second trial, object in particular to the fact that the defences of certain of their codefendants (especially Hanley in the second trial), were antagonistic to their own. Thus, evidence which was prejudicial to them and which would not have been admissible had they been tried separately was admitted because it was relevant to the defence of others. However, this feature of joint trials, like the more general feature of evidence submitted being admissible against less than all of the defendants, does not require severance. *Commonwealth* v. *Mil'en*, 289 Mass. 441, 459-460. *Dauer* v. *United States*, 189 F. 2d 343, 344 (10th Cir.).

Thirdly, Liberty and Woodcock allege that the joinder in the first trial of indictments in which they were named as defendants with "a vast number of indictments in which they were not mentioned necessarily created improper prejudice." It is contended in particular that the joinder of indictments against them and other defendants relating to the giving of bribes, with indictments against Hanley and Garfinkle relating to the soliciting of bribes, "re-

[7] This practice has since been prohibited by G.L. c. 278, § 2A, which we held nonretroactive in *Commonwealth* v. *French*, Mass. , (Mass. Adv. Sh. [1970] 619, 633-634).

sulted in the seepage, nay transference, of evidence not otherwise admissible against these defendants." Liberty and Woodcock's reliance on *King* v. *United States*, 355 F. 2d 700 (1st Cir.), seems to us to be misplaced. In that case severance was required because the two indictments involved, 1 against 1 defendant and 1 against the same defendant and another, related to 2 separate transactions. The court stated that joinder was permissible (even where proof of the other criminal transactions charged would not be admissible in a separate trial) where joinder of the indictments resulted in sufficient benefit to the court, as where there was "an overlapping of issues." P. 704. The example given of such an instance — "when some defendants are charged with transporting stolen goods in interstate commerce, and others are charged with receiving the goods, so stolen" — is closely analogous to the case at bar.

The fourth ground alleged by Liberty and Woodcock in the first trial is that "trying these defendants with other defendants deprived them of the constitutional right to call other defendants as witnesses on their behalf." They cite no case, however, supporting this proposition. There are, on the contrary, cases in the Federal Courts refusing severance despite the fact that 1 defendant is thereby deprived of another defendant as his witness. *Olmstead* v. *United States*, 19 F. 2d 842, 847-848 (9th Cir.). *Gorin* v. *United States*, 313 F. 2d 641, 645-646 (1st Cir.). The instant case is not one in which the defendants seeking severance have shown that their codefendants were in possession of exculpatory evidence. Compare *United States* v. *Echeles*, 352 F. 2d 892, 897-898 (7th Cir.). Nor has Liberty or Woodcock displayed any other substantial need for their codefendants' testimony. Compare *United States* v. *Gleason*, 259 F. Supp. 282, 284-285 (S. D. N. Y.). Indeed, they have failed to demonstrate even that any of

their codefendants would have been willing to testify on their behalf in a separate trial.

Liberty and Woodcock further argue that joinder deprived them not only of the favorable testimony of their codefendants but also of the right to cross-examine codefendants whose extrajudicial statements inculpating Liberty and Woodcock were admitted through the witness Heath. They argue that the rationale of *Bruton* v. *United States*, 391 U. S. 123, should be extended to this case. The statements here in question, however, were admitted under a recognized exception to the hearsay rule for statements of co-conspirators in furtherance of a conspiracy, unlike the confession of 1 codefendant in the *Bruton* case. The court in the *Bruton* case explicitly declined to intimate that the exclusionary rule it required in that case should extend, under the Sixth Amendment, to evidence admitted under "any recognized exception to the hearsay rule." P. 128, fn. 3. Cf. *Dutton* v. *Evans*, 400 U. S. 74. We see no reason to so extend the *Bruton* rule.

We have dealt separately with all the grounds stated. We are aware of the disadvantages accruing to the defendants from joinder, and cited to us as reasons why joinder was improper. We believe that our foregoing discussion demonstrates that none of them standing alone requires severance. The question then remains whether the judge, in considering the disadvantages cumulatively, was compelled to grant severance. It is our view that it was for the judge to weigh all the factors, which were reasonably foreseeable, against the probable benefits of joinder as sought by the Commonwealth. The decision was for him to make as matter of discretion, and we reverse him only if there has been "a clear abuse of discretion" — that is, "[i]f it clearly appear[ed] . . . that . . . [the] defendant . . . [would] not receive a fair trial without a severance when all the circumstances . . . [were]

considered in the light of sound judicial discretion and common sense." *Baker* v. *United States*, 329 F. 2d 786, 787 (10th Cir.). *Johnson* v. *United States*, 356 F. 2d 680, 682 (8th Cir.). *Commonwealth* v. *Geary*, 352 Mass. 427, 431. *Commonwealth* v. *Fancy*, 349 Mass. 196, 204-205. *Barber* v. *Commonwealth*, 353 Mass. 236, 240-241. "The protection of defendants' rights . . . ; while of paramount importance, cannot be considered without reference to the orderly transaction of judicial business. . . . The judge had to consider . . . the cost to the public of a multiplicity of trials." *Barber* v. *Commonwealth*, *supra*, at 240. The Commonwealth, in asking for joinder in the first trial, stated the following grounds: (1) the indictments pertained to the same basic factual transaction, involving the same witnesses, and grouping them would therefore provide a workable and not unduly long trial (see *Commonwealth* v. *Maloney*, 348 Mass. 610, 613); (2) there was a logical nexus among the witnesses and the defendants; (3) complexity and hardship on the defendants would be avoided; and (4) there was a near-coincidence of dates and time spans covering the allegations of criminal conduct. Similar grounds could have been cited to support the second trial grouping. Weighing these considerations against the disadvantages to the defendants arising from joinder, from the point of view of the judge when he decided to grant the Commonwealth's motions, and even in the light of hind-sight, we believe that the defendants have not demonstrated sufficient prejudice to them to override the overwhelming benefits of joinder. There was no abuse of the judge's discretion.

7. The final pre-trial issue raised by Household relates only to the second trial. Household, Glynn, Farrell and Newhall argue that "[t]he trial of Indictment 11908 should have been barred by principles of double jeopardy because of the prior conviction for a legally identical offense in the

trial of Indictment 11900." Accordingly it is contended that it was error for the judge to deny Household's and other defendants' various motions to dismiss which raised this issue. Beneficial, Barber and Pratt have adopted Household's argument on this point.

Indictment 11900, tried in the first grouping, charged 8 corporations and 8 individuals with conspiring to bribe Hanley in his official capacity during a period of 6 years "next preceding the finding and filing of this indictment." Four co-conspirators were named but not charged in the indictment. Indictment 11908 charged 7 corporations and 11 individuals in identical language with a similar conspiracy from January 1, 1957, "continuing up to and including the day of finding and filing of this indictment." Eight others were named as co-conspirators but not defendants in that indictment. The 2 indictments had in common 11 defendants (6 corporations and 5 individuals), and 4 named co-conspirators.

At the request of several defendants the Commonwealth filed bills of particulars with respect to both indictments. In addition, well before the filing of any motion based on double jeopardy in the second trial, the Commonwealth filed "Representations of Evidence in [S]upport of Motion for Joinder or Grouping." This document, together with the various bills of particulars, established that the conspiracy which was the subject of the first trial was a narrow conspiracy to bribe Hanley in connection with the Rate Board proceedings of 1962. By contrast, the conspiracy at which No. 11908 was aimed was continuing. Begun in 1957, it involved yearly payments to Hanley in order to insure in general that his official acts were in the best interests of the small loans industry.

In these circumstances the defendants' various motions were properly denied. Despite the identical charging language, the indictments were sufficiently dissimilar on their

face with respect to dates and persons named to raise a question of fact as to whether the conspiracies charged in the 2 indictments were the same. Had there been no question that the indictments stemmed from the same occurrence, the issue of double jeopardy would have been one of law to be decided from the face of the indictments by the judge. The test would have been whether the same facts which would support a conviction in 1 indictment would likewise be sufficient to support a conviction in the other. *Commonwealth* v. *Roby*, 12 Pick. 496. *Morey* v. *Commonwealth*, 108 Mass. 433. *Commonwealth* v. *Robinson*, 126 Mass. 259. *Commonwealth* v. *DiStasio*, 297 Mass. 347. *Commonwealth* v. *Mahoney*, 331 Mass. 510. In the instant cases, however, where the indictments were as consistent with 2 factually distinct offences as with 1, and where the Commonwealth put this question directly in issue by its replication (*Commonwealth* v. *Wermouth*, 174 Mass. 74, 78), the burden was on the defendants to establish the identity of the facts involved. *Commonwealth* v. *Daley*, 4 Gray, 209. *Commonwealth* v. *Wermouth*, *supra*. They did not satisfy this burden in the face of the evidence submitted by the Commonwealth that No. 11908 referred to a conspiracy distinct from that for which the defendants had been convicted in the first trial. Although both indictments were framed in sufficiently general language so that the same facts could have been used to support a conviction for both, this did not entitle the defendants to a ruling that the first conviction was a bar to the second indictment, where further inquiry demonstrated that the 2 offences charged were not in fact the same. *Commonwealth* v. *Fredericks*, 155 Mass. 455, 457. *Commonwealth* v. *Wermouth*, 174 Mass. 74. *Commonwealth* v. *Sutherland*, 109 Mass. 342, 343. *Short* v. *United States*, 91 F. 2d 614, 624 (4th Cir.).

8. Three of the 4 foreign corporate defendants, Beneficial, Liberty, and Local, have raised the issue whether

the court could exercise jurisdiction over them, and even if it could, whether service of process was properly made on them. Liberty and Local rely on Beneficial's statement of the applicable legal principles, detailing separately only their particular corporate structures against which they would have such principles applied, and the agent on whom service was made. The issue was raised by special appearances, pleas to the jurisdiction and motions to quash process filed separately by the 3 corporate defendants and others. Hearings were held on the various pleas, on which the judge made extensive findings of fact relative to the corporate defendants "doing business" in Massachusetts and to the agents on whom process was served. In each case the judge concluded that the court could exercise jurisdiction and that service had been properly made.

We agree with the judge's rejection of the defendants' preliminary argument "that Massachusetts cannot in any event acquire jurisdiction over them in any criminal case for the simple reason that it has no statute providing therefor, or giving the Court such jurisdiction." We think it is irrefutable, as the judge held, that "having jurisdiction over the offense charged, . . . the Court need not rely on any statute. It has many powers not found in express language of statutes." See *Commonwealth* v. *New York Cent. & H. R. R.R.* 206 Mass. 417, 428-429; *Crocker* v. *Justices of Superior Court*, 208 Mass. 162, 171-172.

The second part of the defendants' argument on the question of jurisdiction is that they, the parent companies, were not doing sufficient business in Massachusetts to enable a Massachusetts court to exercise jurisdiction over them, as opposed to the subsidiary business trusts through which all 3 operated in this Commonwealth. However, we see the question of jurisdiction as indistinguishable from that whether under relevant principles of corporate responsibility, applied to the participation of agents of each cor-

porate defendant in the offences charged, the particular corporate defendant may be held accountable. If under the applicable substantive law a foreign corporation is responsible for the acts of individuals which constituted a crime in this Commonwealth, it is inconsistent with the inherent power of a court to prosecute criminal offenders to insulate the corporation from liability on the basis of the manner in which the corporation generally runs its affairs.[8] Of course, the general corporate structure and its operational features are highly relevant to the question whether the acts of a given individual, who is formally the employee of 1 or of several subsidiary members of the network, may be attributed to the parent corporation. However, that net-

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[8] The defendants' argument on this point is barren of merit. This is reflected by 2 separate proposed drafts of the American Law Institute. The Am. Law Inst., Model Penal Code, § 1.03 (1) (Proposed Final Draft, 1962) provides in pertinent part: "Except as otherwise provided in this Section, a person [including by definition a corporation] may be convicted under the law of this State of an offense committed by his own conduct *or the conduct of another for which he is legally accountable if:* . . . (c) conduct occurring outside the State is sufficient under the law of this State to constitute a conspiracy to commit an offense within the State and an overt act in furtherance of such conspiracy occurs within the State" (emphasis supplied). Restatement 2d: Foreign Relations Law of the United States, § 18, provides: "A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems."

The above simply reflect the elementary rule that a jurisdiction has inherent power to prosecute those who reside outside of its jurisdictional boundaries and commit a crime within its boundaries. Thus, the only question that remains is the evidentiary matter of ascribing the acts of the defendants, who committed overt acts inside the Commonwealth, to the corporations on whose behalf they acted.

work and structure in and of itself is not conclusive on the question of jurisdiction.

There is no need to further discuss the findings of the judge as to the corporate structures of the 3 defendants, or their arguments that the judge erroneously held that these structures established sufficient contacts with the Commonwealth to warrant the exercise of jurisdiction. We refer instead to that part of the opinion, *infra*, wherein we deal with the corporate defendants' responsibility for the acts of their agents in this Commonwealth in furtherance of the conspiracy and discuss the corporate network of the several defendants to the extent that it is relevant.

Finally, we discern no substance to the defendants' claim that service was improperly made. Once power in the court is established, it may be implemented by any appropriate means. G.L. c. 220, § 2. The summonses used in this case were appropriate and sufficient to give the defendants fair notice of the indictments against them, as required by due process of law. *Commonwealth* v. *New York Cent. & H. R. R.R.* 206 Mass. 417, 429. *United States* v. *Standard Oil Co.* 154 Fed. 728, 731 (W. D. Tenn.). See *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316. The only requirement that remains is that service be on appropriate agents of the defendants,[9] and the judge's findings cover this matter. In the case of Beneficial, one Frank J. McCann, trustee of all 3 of the Massachusetts business trusts, vice-president of Beneficial Management Corporation and supervising director for all of Beneficial's Massachusetts loan offices, was

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[9] General Laws c. 223, § 38, provides that service on a foreign corporation may be made as provided in § 37 on domestic corporations. Section 37 (as amended through St. 1962, c. 750, § 71), in part provides that service may be made on "the president, treasurer, clerk, cashier, secretary, agent or other officer in charge of its business." The judge correctly held that these sections were applicable only to civil actions. Therefore, service here is governed by the more flexible principle of due process as well as the general provisions of G.L. c. 220, § 2. See G.L. c. 223A, § 6.

served. In the case of Liberty, service was made on the divisional supervisor of the 15 Massachusetts business trusts through which it did business in Massachusetts. Similarly, in the case of Local, it was made on the district supervisor of the New England division of Provident Management Corporation, a subsidiary of Local which controlled the operations of the Massachusetts loan offices. We see no basis for reversing the judge's determination that each of these 3 men was a proper agent for service on the parent corporation.

9. The final pre-trial issue we treat with is raised by Liberty and Woodcock and relates to a "Motion for Leave to File Motion to Dismiss" and an accompanying "Motion to Dismiss." [10] This issue is unique to them. These motions were filed on September 28, 1966, the thirty-fourth day of the first trial. They claim that "as there was insufficient evidence presented to the grand jury, it was error of constitutional dimension to deny [the] defendants' motions." This contention is based on the testimony of one William F. Heath contained in the grand jury transcript which had been made available to the defendants 2 days before filing their motions. At the hearing on the motions these defendants also submitted the "Commonwealth's stipulation" which they maintain established that this portion of the transcript contained all of the evidence incriminating them which was presented to the grand jury. The stipulation in fact stated that "*[t]o the best of the Commonwealth's knowledge*" this portion was the only testimony relating these defendants to "the events occurring on October 17, 1962." It further stated "*[t]he Commonwealth does not recall* any other grand jury witness who testified to any talk with Lyle S. Woodcock other than William F. Heath,

[10] This was replaced the next day by a "Substitute Motion to Dismiss."

either before or after October 17, 1962, relative to the matters on trial" (emphasis supplied).

The judge correctly ruled that under Rule 101A of the Superior Court (1964),[11] the motion was not timely. In addition he cited G. L. c. 277, § 47A, and a number of cases in support of his action. Both defendants had previously entered pleas of "Not Guilty," and the time for filing special pleas and motions had long since expired for both of them. The motion was therefore addressed to the sound discretion of the judge. He did not abuse this discretion in ruling that despite the fact that "the defendants did not receive the Grand Jury transcript until September 26, 1966," they had made "no showing of any reason sufficiently strong or impelling to require . . . [him] to exercise . . . [his] discretion to permit the defendants to file their proposed '*Substitute Motion to Dismiss*' at this stage of the proceedings, and during the course of the present jury trial." Return of an indictment on insufficient evidence is not an error of constitutional dimensions such as to compel a judge to consider an untimely motion. *Costello* v. *United States*, 350 U. S. 359, 363-364. *Lawn* v. *United States*, 355 U. S. 339, 349-350. Furthermore, assuming *arguendo* that a defendant may, at least in some cases, attack an indictment as based on insufficient evidence and that the portion of the transcript here submitted was insufficient to sustain the indictments against the defendants, the judge was correct in

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[11] "A plea of not guilty, whether voluntarily made by the defendant or entered by order of the Court, shall not be deemed to be a waiver of matters in bar or abatement or an admission of the validity of the indictment or complaint. A defendant at the time of the entry of such plea, or within ten days thereafter or within such further time as the Court may order, may file such motions and other pleadings relating to matters in bar or abatement or to the validity of the indictment or complaint as he may desire without at any time retracting the plea of not guilty.

"Lack of jurisdiction or the failure of the indictment or complaint to charge an offense may be raised at any time during the pendency of the proceedings."

noting that the "stipulation does not state that there was no other evidence before the Grand Jury bearing on these indictments; and it does not exclude the possibility of such other evidence or of inferences from evidence. The records in this case show that these grand jurors were convened or impanelled on January 27, 1964, and that these indictments were returned on May 8, 1964. However, except for what is contained in . . . [the portion of the transcript submitted by these defendants], this Court has no information or knowledge of what evidence was before the grand jurors, or what knowledge or information they had, before they returned the indictments."

PART II

The First Trial

A. *THE EVIDENCE*

We summarize pertinent portions of the evidence most favorable to the Commonwealth.[12] In 1962, the small loans

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[12] In a conspiracy case, the trial judge must make, at least by implication, a preliminary ruling that, as a matter of law, the evidence is sufficient to permit the jury to find that a conspiracy existed and certain persons were parties to it before granting a motion to admit the evidence of the acts, knowledge, and admissions of one conspirator against his co-conspirators. *Commonwealth* v. *French*, Mass. , , fn. 27 (Mass. Adv. Sh. [1970] 619, 637, fn. 27). A preliminary ruling of this type is proper "when sufficient evidence has accumulated to support a fair inference of the existence of a conspiracy." *Commonwealth* v. *Benesch*, 290 Mass. 125, 132-133. In the present case, the trial judge explicitly made a preliminary ruling as to the existence of a conspiracy and participants in the conspiracy.

Therefore, throughout the lengthy trial, items of evidence were admitted subject to limitations. In order to recite the evidence without stating each limitation, we have adopted the following system employed by the Commonwealth which indicates what evidence was admitted against which defendants and subsequently expanded to include other defendants. Each defendant is referred to in connection with a particular item of evidence by footnote. In the footnote the following symbols are used to designate the particular defendants: "H" is Household; "B" is Beneficial; "Lib" is Liberty; "G" is Glynn; "F" is Farrell; "P" is Pratt; "Br" is Barber; "W" is Woodcock; "Hly" is Hanley; and "Gkle" is Garfinkle. Where evidence admitted against a defendant was limited to a specific indictment or count thereof, this

industry in Massachusetts was regulated by the Commissioner of Banks (Commissioner) who was head of the division of banks and loan agencies within the Department of Banking and Insurance. G.L. c. 26, §§ 1, 2. At that time, the law of this Commonwealth provided that any person who sought to engage in the business of making small loans had first to obtain a license from the Commissioner. G.L. c. 140, § 96. The Commissioner was also authorized to appoint a deputy to serve as supervisor of loan agencies. G.L. c. 26, § 4. In 1962, and at all times material to this case, the supervisor of loan agencies and Deputy Commissioner of Banks was Martin J. Hanley.

The permissible interest rate on small loans was regulated by the Rate Board which was within the division of banks and loan agencies. G.L. c. 26, §§ 1-5A. The Rate Board consisted of the State Treasurer, the Commissioner of Banks, the Commissioner of Corporations and Taxation and 2 persons appointed by the Governor, 1 of whom was required to be a representative of organized labor. G.L. c. 26, §§ 5, 5A. In 1962, the members of the Rate Board were John T. Driscoll, State Treasurer, Edward A. Counihan, Third, Commissioner of Banks, Guy J. Rizzoto, Commissioner of Corporations and Taxation, George P. Govostes, and Morris Garfinkle.

Among the corporations actively engaged in making

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is stated following the symbol used for that defendant. Where original limitations were expanded to include other defendants, following the preliminary ruling by the judge as to the existence of a conspiracy, the expanded limitations are shown in parentheses following the original limitations. Thus a footnote which reads "P, G, Hly 11976 (H, B)" means that the item of evidence referred to by the footnote was originally admitted against Pratt and Glynn, and against Hanley only on Indictment 11976, and that following the preliminary ruling the limitation was expanded to include Household and Beneficial. A limiting footnote applies to the evidence immediately preceding it in that paragraph or following the next preceding footnote, if more than 1 footnote appears in a paragraph. Evidence as to which no footnotes appear was admitted without limitation.

"small loans" at interest rates established by the Rate Board were the following: Beneficial, Household, Liberty, American Investment Company of Illinois (American), Family Finance Corporation (Family) and State Loan and Finance Corporation (State).

Beneficial, a holding company incorporated in Delaware, is the sole owner of 3 Massachusetts business trusts licensed to carry on the small loans business in this Commonwealth. These are: Industrial Bankers, New England Equity, and Workingmens Loan Association. Collectively, these trusts have 58 small loans offices throughout Massachusetts, each of which does business under the name of Beneficial. Beneficial is also the sole owner of a subsidiary company, Beneficial Management Corporation (Beneficial Management) which handles the payroll and all of the legal, accounting and auditing services for Beneficial's 3 Massachusetts business trusts.[13]

In 1962, the defendant Glynn was "Director of Industry Relations" for the Beneficial Finance "System." He was formally an employee of Beneficial Management and on the payroll of 1 of Beneficial's business trusts.[14] On occasion he would report to the operating head of Beneficial's local division,[15] but he would report principally to Farrell, who was a vice-president of Beneficial Management.

Pratt was the New England "Regional Director of Public Relations" for Household.[16] In performing his duties he often visited the State House and would talk with personnel in the Department of Banking including those dealing with small loans.[17]

Barber, who was also engaged in public relations work

[13] B
[14] B, G
[15] G
[16] H, P
[17] P

on behalf of Household [18] was Pratt's superior and Pratt would report to him once a week by mail.[19]

Liberty, a Delaware corporation, owned the beneficial shares of several Massachusetts business trusts engaged in the business of making small loans in this State. Woodcock was an executive vice-president and a director of Liberty.[20]

American operated its small loans business in the Commonwealth under the name of Public Finance Corporation (Public). Heath was American's New England regional director and its operations vice-president. Four-fifths of his time was spent in "industrial relations" primarily in maintaining a good relationship "with the Small Loans Department, and the personnel thereof, and particularly [with] . . . Hanley." [21] In the performance of his duties he associated with the public relations men of other finance companies, primarily with Glynn of Beneficial, Pratt of Household and one Gordon J. Thomasch of State.

Heath was the Commonwealth's principal witness. He testified that between 1960 and September, 1963, he met socially with Glynn and with Hanley on the average of 2 or 3 times a week. These meetings generally involved "luncheons, dinners [and a] little socializing" at various Boston Restaurants such as Locke-Ober's, Boston Club, Stella's, Giro's, Jacob Wirth's, Marie's Keyboard, Red Coach Grille and Pete's. Members of the banking department, legislators and representatives of other finance companies also attended. Heath met with Glynn and Hanley outside of Boston and at times overnight at such places as the "Motel 128 out in Dedham on at least a couple of occasions . . . Swampscott, on one occasion . . . at the

[18] H. Br
[19] P
[20] Lib
[21] Hly.

Wequassett Inn and the Nauset Inn in Orleans on at least one occasion . . . [and] at the Orleans Inn on one occasion." In August, 1962, a four-day meeting was held at the Chatham Bars Inn. At all of these meetings the bills were paid prorata by the public relations men of the various finance companies who were present.[22]

Pratt, of Household, was also present "once or twice a year" when Heath and Glynn met with Hanley.[23] Heath and Glynn helped Pratt make out the reports which were sent once a week to Barber stating where Pratt had been and to whom he had talked.[24] At this same time, Glynn, Pratt and Heath would meet as an "unofficial committee of three to get together and check with each other on matters of mutual interest in the absence of any association through which . . . [they] could work." Glynn acted as "sort of a chairman of the group."[25] *Infra*, pp. 67, 68.

During the summer of 1962, the Legislature expanded the $1,500 limitation on small loans to include loans up to $3,000. Since the Rate Board was responsible for regulating the interest rate on such loans, it scheduled hearings on the maximum permissible interest rates which could be charged by licensed finance companies on loans of $1,501 to $3,000. The hearings were scheduled to begin on November 13, 1962. In the interim, the interest rate then applicable to loans of $1,001 to $1,500 was made applicable to loans between $1,501 and $3,000.

About the time of the enactment of the $3,000 ceiling on small loans, Hanley met with Glynn and Heath "three or four" times "in various restaurants." The 3 of them discussed the upcoming hearings before the Rate Board, and the possibility of paying money to Hanley to insure

[22] Hly, G (B-11900, 11910)
[23] Hly, G, P (B-11900, 11910)
[24] P, G
[25] G, P (B, H)

a favorable result from the Rate Board. Characterizing such payment as a "program," Hanley said that "if a program was going to be conducted, that he would handle the program, that there should be no interference from members of the industry, and that it would be his responsibility to deliver the votes." Hanley also said "that the industry would have to have the money put up in advance and that whoever was going to handle any program would have to have access to this money so that the transaction could be completed immediately and on time." Glynn and Heath said in substance that they "had no authority at that time to commit . . . [themselves] to a program, that there was about to be a meeting in New York at which, in . . . [their] opinion, such a decision would be made one way or the other." They further told Hanley that the industry would be content with the interest rates which were then in effect. Hanley replied that "he was happy about this situation" because he had feared that the industry might want a better rate than that presently in existence.[26]

Subsequent to these meetings with Hanley, Heath and Glynn met during the fall of 1962 on at least a half dozen occasions. They discussed between themselves the Rate Board hearings. Glynn told Heath that the defendant Farrell "had delegated to him the responsibility for setting up this meeting in New York." Glynn also said that "he was having difficulty in doing this, difficulty in contacting the various members of the industry who were attending this meeting." Heath responded that, "This makes no sense. You and I are working the lower echelon, and the people you are attempting to contact, it would seem to me that Mr. Farrell is in contact with these people at his level, and that protocol would indicate that he

[26] Hly, G (B)

should set the meeting up." Later, Glynn told Heath that "Farrell had now taken over the arrangements of inviting the various members of the industry, and that the matter was out of his hands as far as talking to the individuals concerned."[27]

Approximately 1 week before the meeting in New York, which was scheduled for October 17, 1962, Heath met with Glynn and Pratt at Purcell's restaurant for lunch. Glynn began discussion of the Rate Board hearings saying, "We are going up to this New York meeting. They will expect us to make recommendations. We should present a united front, if possible, so let's see if we are in agreement. We do not know whether the industry will decide upon a program or not. If they do decide upon a program, we should have a united front." Heath and Pratt each stated that he agreed with Glynn's analysis of the situation. Glynn then said that "[i]f the industry decides to adopt a program, they will ask us to give our recommendation as to what our opinion is of what the total cost of this program might be." Heath again agreed with Glynn but Pratt questioned whether the industry was going to be interested in the program. Glynn reponded: "I believe we should recommend that the cost of such a program would be between fifty and seventy-five thousand dollars." Heath said, "I agree with you . . . but I doubt very much if we can sell that size program in New York." Pratt also questioned the cost of the program by stating, "You will never sell that size program to the industry." Subsequently, Heath said: "We are in agreement . . . and as far as I am concerned we will recommend the same program." Pratt responded by saying: "We are in agreement." Glynn next stated that "Hanley was a key figure in the forthcoming rate hearings" and that a

[27] Hly, G (B)

member of the Rate Board was also a key figure. Glynn mentioned that "Hanley might require as high as $25,000 and that the other member of the Rate Board would have to be treated equally." Heath concurred with Glynn, and Pratt said that "We will have to have at least three votes of the Board."[28]

Approximately 2 or 3 days prior to the New York meeting Glynn told Heath that "[w]e will have a meeting in New York at the Hotel Commodore at 10 o'clock on October 17th."[29] The day before the meeting Hanley telephoned Heath and Heath told him, "We will have the answer when I come back from New York as to whether there will or will not be a program."[30] Heath arrived in New York by train that same night.

The next morning he went to a conference room on the second floor of the Hotel Commodore at approximately 10 A.M. At the meeting were Glynn and Farrell of Beneficial, Pratt and Barber of Household, Godshall of Family, Thomasch of State, Woodcock of Liberty and a lawyer, one Mr. Taulbee. Farrell acted as chairman of the meeting.[31]

After lunch, which began about 1 P.M., while everyone was present except Mr. Taulbee, there was a discussion regarding the Rate Board hearings. Heath testified that everybody present "engaged in that discussion, to various degrees." Farrell initiated discussion concerning a "program." He said: "We now have another decision to make, gentlemen, and that is whether we should consider conducting a program to insure a favorable decision by the Rate Board, or should we go on the merits?" Glynn spoke next, saying, "Hanley is putting pressure on us. When we return from this meeting, we must have an answer on

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[28] G, P (B, H)
[29] G
[30] Hly, G
[31] F, G, Br, P, W (B, H, Lib)

this subject. . . . 'There seems to be no formal preparation for a rate hearing,' and that those of us on the local scene would come to the conclusion that a program should be adopted." Heath agreed. Glynn then resumed speaking. He said: "The conditions of this program are that Mr. Hanley will handle the program. Mr. Hanley will be responsible for obtaining the necessary votes. There is to be no interference on the part of any members of the industry. The money will have to be put up in advance, in escrow . . . so that it will be available immediately upon the decision of the Rate Board." Farrell asked Glynn: "Frank, will you give us your estimation of the cost of this program?" Glynn replied: "We feel the program will cost between fifty and seventy-five thousand dollars." Then "everybody talked at once."[32]

Woodcock was the first to speak out. He said in substance "that the cost of this program was completely ridiculous, out of order, out of control, and that his company would have nothing to do with a program of that size." Barber agreed that the cost was too high saying that "The cost of this program is ridiculous, unheard of, preposterous." Farrell also said that the "cost of this program seems to be completely out of line, but I still think we should give the matter some consideration. . . . Heath, you are on the local scene with Frank; what is your opinion?" Heath replied: "I am in general agreement with Glynn. However, I feel that this program could be handled for approximately half of the minimum figure, or $25,000." Heath further said that he "did not envy the gentleman who handled the program; that the problem is to convince Mr. Hanley that $25,000 was all there was, and there was no more. It was 'take it, or leave it.' And, '. . . if the money was piled up in neat little piles in

[32] F, G, Br, P, W (B, H, Lib)

front of Mr. Hanley,' it was my opinion, '. . . he would take it.' " Glynn responded to Heath "that the figure . . . [Heath] had recommended was ridiculous; such a program would fall flat on its face." However, Woodcock affirmed Heath's estimation saying, "At the $25,000 figure perhaps we have no choice, but I want it clearly understood that the figure is $25,000 and not one penny more, and no one is to come back at a later date and request that the figure be raised, under any conditions." Farrell then confirmed the "program" at that price, stating that "[a]pparently we are in agreement on the $25,000 figure."[33]

The next person to speak asked, "Who is going to handle this program?" Farrell responded, "I presume Frank [Glynn] will," but Glynn then stated, "I will have nothing to do with such a program. I have no intention of going back to Mr. Hanley and making a fool of myself with such a proposition." Heath also refused, saying "Not me. . . . I will have nothing to do with this. I am only giving you my impression of how it can be done. I have had no experience with Rate Boards, and I know no one on the Rate Board." Barber then interjected: "I would like you gentlemen to consider a suggestion that I have. I believe that I might be the logical man to handle this program. Heath and Glynn have to work on a daily basis with Mr. Hanley. I am a stranger. I can come into this State of Massachusetts on a one-shot deal. If Mr. Hanley gets mad at me, there is no harm done. I will not take advantage of the entree. . . . I will not step on Heath and Glynn's toes. I will not stay in the state. I will come in and get out, and Mr. Heath and Mr. Glynn should have no concern over my coming in." Glynn responded to Barber's offer saying, "I doubt very much if Mr. Barber will have any success, but I will step aside."[34]

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[33] F, G, Br, P, W (B, H, Lib)
[34] F, G, Br, P, W (H, B, Lib)

The next question posed at this meeting concerned the apportionment of costs for the "program." Farrell stated: "I presume we will allocate the expenses among the big three on a pro-rata basis of outstandings and possibly with the smaller companies on a flat payment."[35] Subsequently, Godshall of Family and Thomasch of State stated that they did not have sufficient authority to commit their companies. Godshall said: "I have no authority to commit my company. I will report back." Similarly, Thomasch stated: "I do not have authority to commit my company, and I will make my report to my superiors." Farrell then replied: "I understand, and I myself will be in contact with Mr. Whilden of Family and Mr. Winston of State Finance and Loan Company." No other representative at the meeting asserted that he did not have authority to commit his company and the meeting ended shortly thereafter at approximately 4 P.M.[36]

Previously that morning, before the meeting began, Hanley telephoned Glynn. Glynn reported this call to Heath. Later that morning Hanley again called, while the meeting was in progress, and again spoke directly to Glynn. Heath also spoke to Hanley at that time.[37]

Heath returned to Boston the same night and received a call from Hanley. Heath told Hanley that "a problem had arisen at the meeting; that . . . [Glynn] had dropped the ball; that . . . [Glynn] was staying over an extra day; and that, when he came in, undoubtedly he would fill Martin in."[38]

Toward the end of October or the beginning of Novem-

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[35] "Outstandings" are the aggregate amount of loans owed to a particular loan office.

[36] F, G, Br, P, W (H, B, Lib)

[37] Hly, G (B)

[38] Hly (F, G, Br, P, W, H, B, Lib — The subsequent admission was limited to the conspiracy to bribe Hanley indictment, and count 1 of the offer to bribe Hanley indictments.)

ber, before the commencement of the Rate Board hearings, Heath had several conversations with Hanley wherein Hanley asked, "Where is Mr. Barber?" Heath would say, "I haven't the slightest idea." Glynn was present at 1 of these meetings and also said, "I don't know where he is." Later, Glynn and Heath asked Pratt in substance "Where is Barber? Is he coming in or isn't he?" Pratt replied: "Mr. Barber will be in. He is tied up at the moment on other matters." [39]

On November 8, 1962, Heath went to Glynn's room at the Parker House, where he was joined by Glynn, Hanley and another man. They had just had lunch together. At the room, Hanley asked Glynn to call Barber in Washington to assure him that he (Glynn) had not been interfering in the program and would not interfere. Glynn placed the call and Heath heard him say, "Hi, Nat." At that point Hanley left the room, saying that he was going down to the Pub. Glynn told Barber that he (Glynn) had no intention of interfering in the program. The conversation lasted about 20 minutes during which Glynn's voice became loud and he "finally slammed the phone down on the receiver." [40]

In mid-November, 1962, Glynn called Heath and told him he was at the Boston Club with Garfinkle and another member of the Rate Board. Glynn "chuckled" when Heath said: "You wouldn't be lousing things up, would you?"

The Rate Board hearings began on November 13, 1962. The Department of Banking, recognized as a party in in-

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[39] G, Hly (F, Br, P, W, H, B, Lib — The subsequent admission was limited to the conspiracy to bribe Hanley, and count 1 of the offer to bribe Hanley indictments.)

[40] G, H (F, Br, P, W, H, B, Lib — the subsequent admission was limited to the conspiracy indictments, and to count 1 of the substantive indictments for all of these defendants except Beneficial as to which the evidence was admitted on both counts, to wit, the offer to bribe Hanley and Garfinkle.)

terest, was represented by Hanley. He cross-examined witnesses and presented argument to the Rate Board.

During the course of the hearings in the last week of November, Heath received a call from Hanley asking Heath to meet him at the Statler Hotel. When Heath arrived, he was met by Hanley, who then left, returning about 2 hours later with Garfinkle. The 3 of them then went into a dining room to have lunch. During lunch, Heath told Garfinkle, at Hanley's request, that during a meeting in New York Barber had been authorized to conduct negotiations on the "program" and that Glynn had no authority to negotiate. Garfinkle replied, "Thank you, Bill [Heath] I've been confused. Mr. Glynn has been talking to me. Mr. Hanley says he has no authority to. I realize the danger of talking to unauthorized persons." Garfinkle then recounted an incident about a former member of the Rate Board, not related to the 1962 Rate Board, who had been promised $5,000, but never received it.[41]

In the latter part of November, Heath again received a call from Hanley, who said that he wanted Heath to step in and handle the program. Heath refused to do so, saying, "I have no intention and will not step into this program until at least two conditions are met: One, that Mr. Barber personally call me and inform me that he is stepping out of this program; two, that my home office call me and instruct me to step into this program."[42]

Approximately a week later, Heath received another call from Hanley. Hanley said: "Bill, Frank's messing around has raised the ante. It is now necessary to raise another ten thousand dollars. Otherwise, the program is in danger of collapse." Heath repeated that he would not step into the program until the 2 conditions previously mentioned had been met.[43]

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[41] Hly (F, G, Br, P, W, H, B, Lib)
[42] Hly (F, G, Br, P, W, H, B, Lib)
[43] Hly (F, G, Br, P, W, H, B, Lib)

About a week later, approximately the third week in December, Hanley again called Heath. Hanley said that the program was in danger of collapse unless another $10,000 was raised, and it was possible that the Rate Board might bring out a substantial reduction in interest which could cost the industry a considerable amount of money. Heath reiterated his previous conditions.[44]

About the middle of December, Heath saw Barber at a hearing at the State House.[45] Barber said to him: "I just left Martin [Hanley] across the street. He is putting pressure on me to raise another $10,000. I am unable to obtain it from the original group. Do you think that Charlie McDermott and his group could raise the additional $10,000?" Heath suggested that Barber call McDermott directly to see if his group would. Heath and Barber then went to the Parker House. Barber told Heath he was going down to his room to call McDermott.[46] Shortly thereafter, Glynn met Heath in the room and said he had just been drinking at the Pub with Hanley, Garfinkle and Govostes, another member of the Rate Board. Glynn suggested that Heath go back there with him. Heath accompanied Glynn back to the Pub and there they sat down with Hanley, Garfinkle and Govostes.[47]

During the next few days Heath met Glynn on a couple of occasions and asked him if he had "heard any more as to whether McDermott had given Mr. Barber an answer on the additional $10,000?" Glynn replied that "Charlie McDermott told Mr. Barber that his group would have

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[44] Hly (F, G, Br, P, W, H, B, Lib)

[45] It is not clear from the transcript whether this was a Rate Board hearing.

[46] Br (F, G, P, W, H, B, Lib — The subsequent admission was limited to the conspiracy indictments and count 1 of the substantive indictments except as to Household, against whom the evidence was admitted on both counts.)

[47] G (Br, P, F, W, H, B, Lib)

nothing to do with the raising of the additional $10,000. This was a chain program, and let the chains [48] handle it, and his group would have nothing to do with it." [49]

On December 27, 1962, the day the Rate Board made its decision, Glynn and Heath were in the corridor outside the hearing room where the Rate Board was meeting in executive session. Heath said: "What's going on in there, Frank?" Glynn responded, "They're about to adjourn the hearings, and they are placing the responsibility for such adjournment upon Martin." Heath stated that it seemed peculiar to him that Hanley "would stand still for this." [50]

That same day, after the Rate Board hearing had been opened to the public, the chairman of the Rate Board stated: "On the basis of the record, and particularly the request of Mr. Hanley, representing the Banking Department, the . . . [Rate Board] by unanimous vote hereby terminates this hearing." [51] Thus, the Rate Board concluded its hearings at that time without changing the existing interest rates on loans between $1,501 and $3,000.

During the first week in January, 1963, Heath asked Glynn whether "Mr. Barber had come into Massachusetts

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[48] A "chain" refers to a small loans company having more than 1 office.

[49] G (F, Br, P, W — The subsequent admission was limited to the conspiracy indictments and count 2 of the substantive indictments.)

[50] G (F, B, P, W, H, B, Lib — The subsequent admission was made as to all indictments against the corporate defendants but was limited as to the individual defendants on the conspiracy indictment and to count 1 on the substantive indictments.)

[51] Hanley's "request" was embodied in a statement which reads as follows: "[T]he Department [of Banking] wishes to indicate with reluctance that due to the absence of these vital figures in the figures reported by the industry for the year 1961 that it is utterly impossible for anyone to determine at this time the precise amount of a book asset base and, therefore, the Department has absolutely no alternative but to suggest that this Board take no action upon the matter . . . until the 1962 figures have been received and processed by the Banking Department, which should occur to the best of the Department's knowledge and prediction some time in July or September of next year."

to deliver the package?" Glynn said that Barber had not.[52]

There was further testimony from one Jerome Troy, judge of the Municipal Court of the Dorchester District, that he was a long-time friend of Hanley's, and that he and Hanley went to Washington together on or about January 22, 1963. They stayed at the Wardman Park Hotel and the bill was paid for by Household. While in Washington Hanley and Troy visited the offices of 1 of the finance companies and had lunch with 2 men, 1 of whom Troy had met at the finance company office.

Shortly after this trip, Heath met Glynn and asked him if Barber had come to Boston and delivered the "package" to Hanley. Glynn replied, "No, he did not come in, but Marty [Hanley] and Jerry Troy went down to Washington, at which time the package was delivered."[53]

Approximately 9 months later, in September, 1963, Pratt telephoned Heath and told him that Barber was in town and would like to talk to him (Heath). Pratt said: "We are at the Statler Hotel. Will you come over and join us?" Heath replied that he would, and later met Barber at the hotel. Barber told him that Hanley and Troy had been in Washington and that he (Barber) had taken them to lunch. Heath asked, "Was that $25,000 mission ever completed?" Barber replied: "Yes, it was." "For once American . . . brought in their proportional share early."

The above evidence comprises most of the *essential* testimony and exhibits presented to the jury in the first trial. Other pertinent evidence not recited above which is particularly applicable to the case of a specific defendant

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[52] G (F, Br, P, W, H, B, Lib) — The subsequent admission was made as to all indictments against the individual defendants but was limited to count 2 on the substantive indictment, that is, the offer to bribe Garfinkle.)

[53] G (B — The subsequent admission was made on the conspiracy indictments and on count 1 of the substantive indictment.)

or which relates to a specific issue will be recounted in the portion of the opinion where such issue is discussed. In certain instances, because of the many issues involved in these appeals, there will be some degree of overlapping and restatement of evidence.

B. *THE SUFFICIENCY OF THE EVIDENCE.*

The Individual Defendants.

1. *Pratt* — The first issue we treat with concerns the sufficiency of the evidence to link Pratt to the alleged conspiracy. The evidence initially admitted against Pratt, and offered as tending to connect him to the conspiracy may be divided into 4 categories: (1) Evidence concerning Pratt's position and duties in connection with his employment by Household Finance Corporation; (2) His meeting with Heath and Glynn at Purcell's restaurant within 1 week before the Commodore Hotel meeting; (3) The general industry meeting of October 17, 1962, at the Commodore Hotel in New York City; and (4) The incident in early November, 1962, when Pratt told Glynn, "Barber is tied up but he will be in."

The first category of evidence shows that Pratt came to Massachusetts in 1959 as Household's regional director for public relations in New England. As part of his duties, Pratt kept in touch with members of the Legislature and personnel in both the Department of Banking and the small loans division. He presented to them Household's position on legislative and regulatory matters, visited the State House, and attended the hearings of legislative committees. He also attended certain hearings of the Department of Banking, the Rate Board, and was present at a meeting of the small loans division. Early in 1962, Barber became Pratt's superior and Pratt reported to Barber once a week by mail. Pratt informed Barber where he (Pratt) had been and to whom he had talked.

Pratt associated with Glynn of Beneficial and Heath of

American. Glynn and Heath helped Pratt make out his reports. These 3 men constituted an "unofficial committee," with Glynn as "sort of a chairman," so that each of them might check with the others on matters of mutual interest. Heath and Glynn kept Pratt informed about matters of which Pratt might otherwise have had no knowledge. Pratt attended at least 1 function at which Hanley was present and also had luncheons with Hanley, Heath and Glynn once or twice a year. On such occasions the bill was divided among the public relations men present and Pratt paid Household's pro rata share.

The second category of evidence concerns the meeting at Purcell's restaurant. In its brief, the Commonwealth chooses not to rely on this evidence in trying to link Pratt to the conspiracy in view of the fact that the defendants Pratt, Glynn, Barber, Farrell, Hanley, Woodcock, Liberty, Household and Beneficial all argue that they are entitled to a new trial on the ground that Heath's expense vouchers covering the period in which the luncheon took place were not disclosed to them by the Commonwealth until after the first trial had been completed. This issue is discussed *infra*, p. 106 of this opinion where we conclude that there was no error in the admission of this evidence and that the defendants are not entitled to a new trial on this ground. Therefore, we recite that part of the evidence concerning this meeting as it relates to Pratt's participation in the conspiracy.

Heath met Glynn and Pratt at Haley's restaurant in Boston and the 3 of them then went to Purcell's restaurant for lunch. This occurred approximately 1 week before the meeting in New York. Glynn began to discuss the forthcoming meeting in New York and said: "We are going up to this New York meeting. They will expect us to make recommendations. We should present a united front, if possible, so let's see if we are in agreement. We do not know

whether the industry will decide upon a program or not. If they do decide upon a program, we should have a united front." Heath and Pratt each agreed that they should present a united front on the presentation of a "program." But when Glynn suggested a program costing between $50,000 and $75,000, Pratt said: "You will never sell that size program to the industry." After further discussion concerning the recommendations that they would make in New York, Pratt said: "We are in agreement." The discussion then turned to the fact that Hanley was the "key figure in this program." Pratt agreed with this analysis of the situation and said: "We will have to have at least three votes of the Board."

The third category of evidence shows that on October 17, 1962, Pratt attended the meeting at the Hotel Commodore in New York City. All of those present were active in the small loans industry, including Barber, Pratt's superior, Farrell of Beneficial, and others. At least 1 of the purposes of the meeting as announced by Farrell, the meeting's chairman, was to review the preparations for the forthcoming Rate Board hearing and to determine whether to adopt a Rate Board "program." Farrell said in substance: "We now have another decision to make, gentlemen, and that is whether we should consider conducting a program to insure a favorable decision by the Rate Board, or should we go on the merits?

In response to Farrell's statement, Glynn said: " 'Hanley is putting pressure on us. When we return from this meeting, we must have an answer on this subject . . . . There seems to be no formal preparation for a rate hearing, and . . . those of us on the local scene would come to the conclusion that a program should be adopted." Heath agreed with Glynn that a program should be adopted. There is no evidence that Pratt, the third member of the "unofficial committee" on the "local scene" said or did anything dur-

ing this discussion. However, he did not disavow any aspect of the obvious conspiratorial plan. Other details of this meeting we have previously recounted and we do not repeat them. In substance, the evidence shows that a plan was agreed upon to pay Hanley $25,000 and that Barber, Pratt's superior, agreed to come into "Massachusetts on a one-shot deal" as a stranger and "handle this program."

The fourth and last category of evidence involves a statement made by Pratt during the first week in November, shortly before the commencement of the Rate Board hearing. Pratt met with Heath and Glynn and each of them inquired about Barber. Heath said: "Is he coming in or isn't he?" Pratt replied, "Mr. Barber will be in. He is tied up at the moment on other matters."

Pratt argues, in essence, that this evidence was insufficient to link him to the alleged conspiracy because "he neither said nor did anything at all which in any way advanced the object of the conspiracy or could be construed as a promise to do so." On the other hand, the Commonwealth argues that there is evidence of affirmative action by Pratt in furtherance of the conspiracy and that even had there been no evidence of an affirmative act on the part of Pratt, his "knowing acquiescence" in and agreement to the plans of the other conspirators was sufficient. On this later point, the Commonwealth relies on the case of *Commonwealth* v. *Farulli*, 352 Mass. 95, 113.

The principles which are determinative of the offence of conspiracy are well settled. In the oft cited case of *Commonwealth* v. *Hunt*, 4 Metc. 111, 123, Chief Justice Shaw, in a classic passage, stated the definition of conspiracy to be a "combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." The requirement of "concerted action" does not mean that either 1

or all of the conspirators must commit some overt act in furtherance of the unlawful agreement. "[T]he offence is complete, when the confederacy is made, and any act done in pursuance of it is no constituent part of the offence, but merely an aggravation of it." *Commonwealth* v. *Judd*, 2 Mass. 329, 337. However, "it may be assumed that mere knowledge of an unlawful conspiracy is not sufficient to make one a member of it, but that he must actively participate therein and must do something in furtherance of it before he is liable as a member." *Commonwealth* v. *Beal*, 314 Mass. 210, 222. Accord, *United States* v. *Falcone*, 311 U.S. 205, see p. 69. *Thomas* v. *United States*, 57 F. 2d 1039 (10th Cir.).

Although the need for concerted action or active participation requires actual commitment to the conspiratorial plan, contrary to the contention of the defendant it is not necessary that 1 play an active role in the actual execution of the object of the conspiracy. The language in the *Beal* case, *supra*, that one "must do something in furtherance of it" we construe to mean simply that one must be shown to have at least communicated to other conspirators his willingness to join in the conspiracy. The very fact that one gives his affirmative acquiescence to the object of a conspiracy may in many cases be doing "something in furtherance of it." A particular defendant's participation in a conspiracy may be proved where his approval of the plan stimulates the activities of others to carry out the conspiracy, even though his participation does not involve an overt act, such as the handing of bribe money to a public official. In this context, the line that separates mere knowledge of the fact that a conspiracy exists from participation in the conspiracy is often vague and uncertain. It is within the province of the jury to determine from the evidence whether a particular defendant had crossed that line. *Egan* v. *United States*, 137 F.2d 369, 378 (8th Cir.).

In the present case, there is ample evidence that Pratt agreed to participate in a plot, euphemistically characterized as a "program," to bribe Hanley. As 1 of the 3 members of the "unofficial committee" Pratt agreed at the meeting at Purcell's that this "committee" should present a "united front" concerning their recommendations on the adoption of a "program." He agreed that a "program" should be adopted, only disputing the amount to be contributed. The fact that he remained silent at the New York meeting where the "program" was formulated and the conspiracy completed is inconsequential. It is not unreasonable to assume that Glynn as "chairman" of the "unofficial committee" could be expected to present their views as he did and that Barber, as Pratt's superior, would speak on behalf of Household. The previous agreement among Glynn, Pratt and Heath at Purcell's, Pratt's presence and silent acquiescence at the Commodore meeting, and his statement that "Mr. Barber will be in," constitute sufficient evidence of affirmative conduct to link him to the conspiracy.

Even should we assume, as Pratt argues, that there is no direct evidence of his agreement to join in the conspiracy he would not be absolved of his participation therein. "A conspiracy may be proved by circumstantial evidence, and this is the usual mode of proving it, since it is not often that direct evidence can be had. The acts of different persons who are shown to have known each other, or to have been in communication with each other, directed towards the accomplishment of the same object, especially if by the same means or in the same manner, may be satisfactory proof of a conspiracy." *Attorney Gen.* v. *Tufts*, 239 Mass. 458, 494.

Having concluded that there is evidence of affirmative conduct by Pratt, we do not consider here whether "knowing acquiescence" in the circumstances of this case is suffi-

cient to link Pratt to the conspiracy. This issue and the *Favulli* case, *supra,* with respect to it were discussed at length in the briefs. We hold that the judge's instructions to the jury on this point were correct (*infra*, 99) and discern no reason for further comment relative thereto.

The evidence originally admitted against Pratt was sufficient, as matter of law, to warrant the admission in evidence against Pratt of the acts, knowledge and statements of the other conspirators. There was no error in the denial of Pratt's motion for a directed verdict. *Commonwealth* v. *Stasiun,* 349 Mass. 38, 51.

2. *Woodcock* — Woodcock, an executive vice-president and director of Liberty, is the only other individual contesting the sufficiency of the evidence to charge him with the conspiracy. The essence of his argument is that the Commodore Hotel meeting amounted to only an "inchoate agreement" with each of the participants having to go back and report to his respective corporation and that none of the individuals present had the authority to bind their corporations. On this basis Woodcock argues that the only evidence allegedly incriminating him is 1 statement that he made at the Commodore Hotel meeting, which tends to prove, if anything, that the agreement was never consummated.

In the following part of this opinion we discuss whether Woodcock and the other participants in the Commodore Hotel meeting had the authority to speak on behalf of their corporations. Here, we confine our discussion to whether the evidence was sufficient to permit a finding that Woodcock conspired as an individual to bribe a public official.

The evidence concerning Woodcock shows that he was present at the Commodore Hotel when Farrell brought up the subject of a "program to insure a favorable decision by the Rate Board." After Glynn reorted that the program would cost between "fifty and seventy-five thousand dol-

lars," Woodcock said that "this program was completely ridiculous, out of order, out of control, and that his company would have nothing to do with a program of that size." Further discussion ensued and Heath said that "this program could be handled for . . . $25,000." With the amount hanging in the balance, Woodcock then said: "At the $25,000 figure perhaps we have no choice, but I want it clearly understood that the figure is $25,000 and not one penny more, and no one is to come back at a later date and request that the figure be raised, under any conditions." Farrell then responded: "Apparently we can agree on the $25,000."

The above evidence clearly supports a finding that Woodcock knowingly and intentionally agreed with Farrell, Glynn, Barber and Pratt to bribe Hanley. In the context of the discussion, Woodcock's statements that "we have no choice" and "I want it clearly understood that the figure is $25,000 and not one penny more" is more than sufficient "to support a fair inference of the existence of a conspiracy." *Commonwealth* v. *Benesch,* 290 Mass. 125, 132-133. The judge properly admitted evidence of the acts, knowledge and statements of other conspirators against Woodcock. The judge was correct in denying Woodcock's motion for a directed verdict. *Commonwealth* v. *Riches,* 219 Mass. 433, 438.

C. *THE SUFFICIENCY OF THE EVIDENCE.*

The Corporate Defendants.

Having concluded that the evidence was sufficient to establish that the defendants Pratt and Woodcock were part of a conspiracy joined in by Farrell, Glynn and Barber to bribe Hanley and Garfinkle, we turn to the question of whether there was sufficient evidence to support a finding that Beneficial, Household, and Liberty were parties to the conspiracy. Each of the corporate defendants raised this issue by means of a motion for a directed verdict. In view

of the fact that this issue is discussed extensively in the briefs of the respective corporate defendants as well as in the Commonwealth's brief,[54] and because the legal principles involved permeate these cases, in this part of the opinion we discuss at length the applicable legal standards concerning the extent to which a corporation may be held criminally responsible for the acts of its directors, officers and agents. We then summarize the evidence admitted against the respective corporations and apply the appropriate legal standard to the evidence. We also note here that in their pretrial briefs 3 of the corporate defendants raised the question whether the Superior Court had jurisdiction over them. Since we disposed of the defendant's jurisdictional contentions in the pre-trial portion of this opinion on the ground that these contentions essentially involve the sufficiency of the evidence to charge the foreign corporate defendants with the acts of the respective individual defendants, we herewith treat the jurisdictional question on that basis.

With this in mind, perhaps it would be helpful at this point to briefly summarize the relationships between the various corporate defendants and individual defendants: (1) Household was held criminally responsible, in part, for the criminal conduct of Barber and Pratt. Barber and Pratt were employees of Household, but were neither directors nor officers. (2) Liberty was held liable, in part, for the criminal acts of Woodcock, who was 1 of Liberty's 2 executive vice-presidents and 1 of its 11 directors. (3) Beneficial was held criminally responsible, in part, for the conduct of Farrell and Glynn who were neither directors, officers nor employees of that corporation. Farrell was a

[54] The first trial briefs for Beneficial alone devote 45 pages to the issue of corporate responsibility. First trial briefs submitted on behalf of Household cover 68 pages, the Liberty brief covers 34 pages. The Commonwealth's first trial briefs take up 63 pages. Second trial briefs on this issue utilize approximately the same amount of space.

vice-president and Glynn was an employee of Beneficial Management, a wholly owned subsidiary of the defendant, Beneficial. Other evidence pertaining to the criminal responsibility of the corporate defendants will be summarized as we treat with each of them.

1. *Standards of Criminal Responsibility* — The defendants and the Commonwealth have proposed differing standards upon which the criminal responsibility of a corporation should be predicated. The defendants argue that a corporation should not be held criminally liable for the conduct of its servants or agents unless such conduct was performed, authorized, ratified, adopted or tolerated by the corporations' directors, officers or other "high managerial agents" who are sufficiently high in the corporate hierarchy to warrant the assumption that their acts in some substantial sense reflect corporate policy. This standard is that adopted by the American Law Institute Model Penal Code, approved in May, 1962. Section 2:07 of the Code provides that, except in the case of regulatory offences and offences consisting of the omission of a duty imposed on corporations by law, a corporation may be convicted of a crime if "the commission of the offence was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment." The section proceeds to define "high managerial agent" as "an officer of a corporation . . . or any other agent . . . having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation." [55]

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[55] Section 2.07 of the Model Penal Code was materially amended between 1955 (Tentative Draft No. 4, p. 22; see pp. 146-155, for the comments on the unamended section) and its adoption in 1962 (Proposed Final Draft, pp. 35, 38) by adding the italicized words "or recklessly tolerated." These words seem to expand corporate criminal liability to include at least cases where high managerial

The Commonwealth, on the other hand, argues that the standard applied by the judge in his instructions to the jury was correct. These instructions, which prescribe a somewhat more flexible standard than that delineated in the Model Penal Code, state in part, as follows: "[T]he Commonwealth must prove beyond a reasonable doubt that there existed between the guilty individual or individuals and the corporation which is being charged with the conduct of the individuals, such *a relationship that the acts and the intent of the individuals were the acts and intent of the corporation.* Or, to put it differently, the Commonwealth must prove beyond a reasonable doubt that when the individuals were acting criminally in committing the acts which constitute the crime, and in having the intent required for the crime, *the corporation was actually so acting and intending,* and therefore is criminally liable. The Commonwealth must prove that.

"How is that to be shown? How is the jury to determine whether the Commonwealth has proved that? First let me say that the Commonwealth does not have to prove that the individual who acted criminally was expressly requested or authorized in advance by the corporation to do so, nor must the Commonwealth prove that the corporation expressly ratified or adopted that criminal conduct on the part of that individual or those individuals. *It does not mean that the Commonwealth must prove that the individual who acted criminally was a member of the corporation's board of directors, or that he was a high officer in the corporation, or that he held any office at all.* If the Common-

officers shut their eyes to (or try to remain aloof from and apparently unaware of) criminal activity by subordinates undertaken for the corporation's benefit. Cf. Restatement 2d: Agency, § 217D, comment d (1957): "Apart from statute, an employer is not subject to a penalty for an unauthorized act constituting a crime committed by an ordinary servant in the scope of employment if the basis for liability is a specific criminal intent. However, . . . an employer may be penalized for the act of an advisory or managerial person acting in the scope of employment."

wealth did prove that an individual for whose act it seeks to hold a corporation criminally liable was an officer of the corporation, the jury should consider that. *But more important than that, it should consider what the authority of that person was as such officer in relation to the corporation.* The mere fact that he has a title is not enough to make the corporation liable for his criminal conduct. The Commonwealth must prove that the individual for whose conduct it seeks to charge *the corporation criminally was placed in a position by the corporation where he had enough power, duty, responsibility and authority to act for and in behalf of the corporation to handle the particular business or operation or project of the corporation in which he was engaged at the time that he committed the criminal act, with power of decision as to what he would or would not do while acting for the corporation, and that he was acting for and in behalf of the corporation in the accomplishment of that particular business or operation or project, and that he committed a criminal act while so acting.*

"The Commonwealth must prove all that beyond a reasonable doubt before you can hold a corporation criminally liable or guilty by reason of the criminal acts or conduct of an individual.

"You will note from what I said that it is not necessary that the Commonwealth prove that an individual had any particular office or any office at all or that he had any particular title or any title at all. It isn't the title that counts. *It isn't the name of the office that counts, but it's the position in which the corporation placed that person with relation to its business, with regard to the powers and duties and responsibilities and authority which it gave to him which counts.* If it placed him in a position with such power, duty, authority, and responsibility that it can be found by you that, when he acted in the corporation's business, the corporation was acting, then you may find the corporation

equally guilty of the criminal acts which he commits and of the intent which he holds, if you first find that the individual was guilty of the crime.

"Now, this test doesn't depend upon the power, duty, the responsibility, or the authority which the individual has with reference to the entire corporation business. The test should be applied to his position with relation to the particular operation or project in which he is serving the corporation" (emphasis supplied).

The difference between the judge's instructions to the jury and the Model Penal Code lies largely in the latter's reference to a "high managerial agent" and in the Code requirement that to impose corporate criminal liability, it at least must appear that its directors or high managerial agent "authorized . . . or recklessly tolerated" the allegedly criminal acts. The judge's instructions focus on the authority of the corporate agent in relation to the *particular* corporate business in which the agent was engaged. The Code seems to require that there be authorization or reckless inaction by a corporate representative having some relation to framing corporate policy, or one "having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation." Close examination of the judge's instructions reveals that they preserve the underlying "corporate policy rationale of the Code by allowing the jury to infer "corporate policy" from the *position* in which the corporation placed the agent in commissioning him to handle the particular corporate affairs in which he was engaged at the time of the criminal act. We need not deal with the Model Penal Code in greater detail. Although we give it careful consideration (see e.g. *Commonwealth* v. *McHoul*, 352 Mass. 544, 547-555) as a scholarly proposal, it has not been enacted in Massachusetts and does not purport to be a restatement of existing law. It is not clear (see fn. 55, *supra*) that if the Code had been in

effect in Massachusetts, when the acts alleged and proved were committed, the corporate defendants would have been in a better situation, in view of the proof here of concerted criminal conduct (in a "program" designed to be of benefit to finance companies) by plainly significant representatives of three or more competing financing companies and the sums involved. We do not consider whether the circumstances would permit inferences of facts constituting a violation of the Code. The judge correctly charged the jury on the basis of decided cases, rather than on the basis of a proposed model code.

It may also be observed that the judge's standard is somewhat similar to the traditional common law rule of respondeat superior. However, in applying this rule to a criminal case, the judge added certain requirements not generally associated with that common law doctrine. He further qualified the rule of respondeat superior by requiring that the conduct for which the corporation is being held accountable be performed *on behalf of the corporation*. This factor is noted as important in the commentary to § 2.07 (1) of the Model Penal Code. It may well be that there is often little distinction between an act done *on behalf of a principal* and an act done *within the scope of employment*, which is the traditional requirement of the doctrine of respondeat superior. Nevertheless, in the circumstances of this case it might reasonably be concluded that the explicit instruction of the judge that the jury look to the authority vested in the agent by the corporation to act within the particular sphere of corporate affairs relating to the criminal act, together with the explicit instruction that such act be performed on behalf of the corporation, required, in effect, the type of evidence which would support an inference that the criminal act was done as a matter of corporate policy. We deem this to be a valid conclusion, especially in view of the quantum of proof required in a criminal case in order to prove guilt beyond a reasonable doubt.

The defendants seek to make the question of corporate criminal responsibility one first impression in this Commonwealth. They argue that there is "no Massachusetts case" dispositive of the question as to when a corporation may be held criminally liable for the acts of its servants or agents *where the offense is one which involves specific intent.* Conversely, the Commonwealth contends that the standard applied by the judge was expressed long ago in the case of *Telegram Newspaper Co.* v. *Commonwealth,* 172 Mass. 294, 299. This case, it is argued, serves as precedent for the rule that corporate criminal responsibility can be predicated on the acts of an agent who is neither a director nor an officer of the corporation.

In seeking to resolve the adverse contentions posed above, and in order to formulate a correct standard in the perspective of precedence, we think it would be helpful at this point to review the decisions in this Commonwealth al well as cases in other jurisdictions which in some way deal with this issue. No Massachusetts case has been brought to our attention involving the prosecution of a corporation for bribery or for criminal conspiracy, although there have been cases holding corporations civilly liable for conspiracy. E.g. *Aberthaw Constr. Co.* v. *Cameron,* 194 Mass. 208, 213; *Lovejoy* v. *Bailey,* 214 Mass. 134, 153; *Potter Press* v. *C. W. Potter, Inc.* 303 Mass. 485, 493. In fact, there appear to be only 4 reported instances in this Commonwealth where a corporation has been sought to be held liable for a classic common law crime.

The first is the *Telegram* case, *supra,* which involved the conviction of 2 newspaper publishing corporations for criminal contempt. The corporations published articles relating to a pending trial in the Superior Court. The treasurer and manager of 1 newspaper and the editor and publisher of the other were discharged in the trial court "on the ground that they were not shown to be di-

rectly responsible for the publications." *Telegram Newspaper Co.* v. *Commonwealth*, 172 Mass. 294, 299. The Superior Court made no finding whether "there was an intent to influence the trial of the cause referred to on the part of anybody," and this court assumed "that the person or persons who wrote and caused the articles to be published . . . acted without any intent to pervert the course of justice." *Id.* Having made this assumption the court framed the basic issue in the case as follows: "As the only intent which can be imputed to the corporations is the intent of its officers or agents, the question is whether the publication of these articles without any intent to pervert the course of justice can be adjudged a contempt." *Id.* Despite the fact that there was no evidence that any officer or director of the defendant corporations either authorized or ratified the publications, which were written by a subordinate employee (a reporter), the court affirmed the convictions.

In the present case, the judge treated the *Telegram* case as "persuasive authority for the rule that there can be corporate criminal responsibility for the actions of an agent who is neither a Director nor an officer of the corporation." Household, however, argues that the *Telegram* case was a case of strict liability involving a crime which did not require specific intent and that there is a sharp distinction between the violation of regulatory or "public welfare" statutes and common law crimes which are mala in se as charged here. It is argued that this dichotomy exists throughout the criminal law relating to corporate criminal responsibility and that this Commonwealth only has cases dealing with the so called public welfare offenses.

We note that although there is language in the *Telegram* case which is somewhat ambiguous, and tends to obscure whether specific intent was a requisite element

in that case, Professor Ballantine has stated, in his discussion of the criminal liability of corporations, that the *Telegram* case "involves a specific intent as a necessary element." Ballantine, Private Corporations, 311 (1927). In any event, we think it is clear that the crime of criminal contempt cannot be equated to minor regulatory offenses such as a parking violation and that the judge properly applied it as precedent for the rule that a corporation can be held criminally responsible for the acts of one who is neither a director nor officer. The Model Penal Code, § 1.04 (Proposed Official Draft), defines "violations" as offenses which do not carry the penalty of imprisonment, and includes only petty offenses and the Supreme Court of the United States has recognized that criminal contempt is not a petty offence. *Bloom* v. *Illinois,* 391 U. S. 194, 207. In addition, it is a crime generally included in that class of offenses which are mala in se. See Anderson, Wharton's Criminal Law & Procedure, § 53 at pp. 121-122.

The most recent case in this Commonwealth dealing with the prosecution of a corporation for a common law crime also involved criminal contempt. In *Worcester Tel. & Gazette, Inc.* v. *Commonwealth,* 354 Mass. 578, 581, we held that conviction of a newspaper corporation and of a reporter for criminal contempt violated their First Amendment rights of freedom of the press and speech where the publication was not made with wilful design to affect a trial and did not present a clair and present danger to the administration of justice. In view of the fact that this *Telegram* case was decided on Federal constitutional grounds it did not involve the question of corporate criminal respons'bility and therefore sheds no light on the question.

The third case is *Commonwealth* v. *Lewis Constr. Co. Inc.* 343 Mass. 600, in which a corporation and its president, treasurer and sole stockholder were convicted of larceny. Without alluding to the question of corporate

criminal responsibility, we there held that the evidence was insufficient to warrant the convictions.

The fourth case we have found involving the prosecution of a corporation for a crime involving specific intent is *Commonwealth* v. *Abbott Engr. Inc.* 351 Mass. 568, in which a corporation was convicted of larceny, along with the chairman of the board of directors. The chairman had full control of the corporation and all of its transactions, and his wife owned all of the corporation's stock. The convictions were affirmed, but the question of the corporation's liability was not argued on appeal nor mentioned in the opinion. The focal point of the decision was the responsibility of an *individual for the acts of a corporation* which the court found to be the *individual's agent.* The court stated that "[w]here a principal is in full control and participates in an agent's act by close direction and assent, principal criminal responsibility attaches to him." *Commonwealth* v. *Abbott Engr. Inc., supra,* at 580.

The *Abbott* case is akin to a long line of decisions in this Commonwealth holding that before criminal responsibility can be imposed on the master, based on a master-servant relationship under the doctrine of respondeat superior, actual participation in, or approval of, the servant's criminal act must be shown. The first case we discovered considering this question was *Commonwealth* v. *Nichols,* 10 Metc. 259, in which a store owner was convicted of selling liquor without a license when his servant actually made the sale. The court ruled as follows: "The question here raised as to the liability of the principal to be punished criminally for the acts of his agent or servant, in which he does not directly participate personally, is certainly not free from difficulty. As to civil liabilities, a broader and more general principle of responsibility applies, and the master or principal may be held to answer

in damages for default and misdoings with which he had no other connexion than that which arises from the fact that the injury was occasioned by one employed in his service. As a general rule, something beyond this is necessary to charge the master criminally for acts done by the servant. There must be such a direct participation in the act, or such assent and concurrence therein, as would involve him morally in the guilt of the action. Hence the cases are comparatively rare, and may be considered as exceptions to the general rule, where by legal rules a party is charged criminally for acts of his servant done without his knowledge and assent. . . . But if a sale of liquor is made by the servant without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved or countenanced by him, and this is clearly shown by the master, he ought to be acquitted." Pp. 260-263.

Other cases involving the illegal sale of liquor by a servant are *Commonwealth* v. *Putnam*, 4 Gray, 16-17-18, *Commonwealth* v. *Uhrig*, 138 Mass. 492; *Commonwealth* v. *Wachendorf*, 141 Mass. 270, *Commonwealth* v. *Briant*, 142 Mass. 463, *Commonwealth* v. *Stevenson*, 142 Mass. 466, *Commonwealth* v. *Hayes*, 145 Mass. 289, and *Commonwealth* v. *Rooks*, 150 Mass. 59. In each of these cases the court reiterated the rule that the mere fact of agency is not enough to impose criminal liability on the master. In *Commonwealth* v. *Stevens*, 153 Mass. 421, 429, another illegal liquor case, the court phrased the rule as requiring that the master "in some way participate in, countenances, or approves the criminal act of his servant."

Each of the above cases involved crimes which are mala prohibita as opposed to crimes which are mala in se. However, it appears that in cases which are generally classified as mala in se, the above rule was not changed. For example, in *Commonwealth* v. *Anthony*, 306 Mass. 470, a

case in which 1 partner was sought to be held liable for the larcenous acts of another partner, the above rule was cited at p. 478 of the opinion. See *Commonwealth* v. *Welansky*, 316 Mass. 383, 402, and *Commonwealth* v. *Abbott Engr. Inc.*, *supra*, 580.

The thrust of each of the cases cited above involving a human principal is that it is fundamental to our criminal jurisprudence that for more serious offences guilt is personal and not vicarious. "One is punished for his own blameworthy conduct, not that of others." *Commonwealth* v. *Stasium*, 349 Mass. 38, 48, citing Perkins, Criminal Law, 550, and Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. 689. Professor Sayre's article is heavily relied on by Beneficial for the proposition that the considerations proposed by Sayre apply with equal weight to corporations. However, we do not think that the Sayre article, or the rule in the master-servant cases, is helpful to these corporations. The essence of Sayre's discussion is that, as to certain crimes, a theory of vicarious liability is an inadequate basis for imposing criminal liability on a natural person who can suffer imprisonment or ignominy for the acts of his agents. *Id.* at 722-723. (We, too, have recently rejected the concept of individual guilt by mere association. *Commonwealth* v. *Pina*, Mass. , .[a1]) In fact, Professor Sayre explicitly refrains from dealing with the problem of imposing corporate criminal liability when he states: "The problem of the criminal liability of a corporation for the acts of corporate agents depends upon a consideration of two quite distinct problems, one a problem of agency, and the other a problem of the law of corporations. The first involves the general question of criminal responsibility for the acts of another. Would the principal be criminally liable for the acts of the agent if the principal were a natural person instead of a

[a1] Mass. Adv. Sh. (1971) 1293, 1296.

corporation? The second problem involves the entirely distinct question of when the acts and intent of a natural person, for example of a vice-president or general manager, are to be treated as those of the corporation itself. In . . . [this article], only the first of these two problems is considered." Sayre, Criminal Responsibility for the Acts of Another, 43 Harv. L. Rev. at 689.

As alluded to by Professor Sayre, and pointed out by the Commonwealth in its brief, the very nature of a corporation as a "person" before the law renders it impossible to equate the imposition of vicarious liability on a human principal with the imposition of vicarious liability on a corporate principal. "A corporation can act only through its agents. . . . [C]orporate criminal liability is necessarily vicarious." Note, Criminal Liability of Corporations for Acts of Their Agents, 60 Harv. L. Rev. 283. See Francis, Criminal Responsibility of the Corporation, 18 Ill. L. Rev. 305, 308; Lee, Corporate Criminal Liability, 28 Col. L. Rev. 1, 13. Since a corporation is a legal fiction, comprised only of individuals, it has no existence separate and distinct from those whom it has clothed with authority and commissioned to act for it whether such individuals are directors, officers, shareholders or employees. Thus, the issue is not whether vicarious liability should be imposed on a corporation under the "direct participation and assent rule" of the master-servant cases cited above, but rather, whether the acts and intent of natural persons, be they officers, directors or employees, can be treated as the acts and intent of the corporation itself. For the foregoing reasons, despite the strenuous urging of the defendants, we are unconvinced that the standard for imposing criminal responsibility on a human principal adequately deals with the evidentiary problems which are inherent in ascribing the acts of individuals to a corporate entity.

Since we have exhausted our review of Massachusetts cases in point, we turn to cases in other jurisdictions discussing the problem of corporate criminal responsibility. We note, however, that in view of the fact that the crimes alleged here, namely, conspiracy and the substantive offences of bribery, are mala in se, we necessarily exclude discussion of those cases which *clearly* involve "public welfare" offences by a corporation, unless such cases cast some insight into the question before us. Generally, these cases concern public nuisances resulting from the nonperformance of a nondelegable duty, rather than the rule of respondeat superior. Cardozo, J., *People ex rel. Price* v. *Sheffield-Farms-Slawson-Decker Co.* 225 N. Y. 25, 27-30.[56]

We first treat with the case of *New York Cent. & H. R. R.R.* v. *United States*, 212 U. S. 481, a case relied upon by both the judge and the Commonwealth. There, the Supreme

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[56] In Massachusetts, the following cases may be classified among the type of offences referred to above. *Commonwealth* v. *Proprietors of Newburyport Bridge*, 9 Pick. 142 (indictment alleging proprietors neglected to provide repairs for bridge as required by statute); *Springfield* v. *Connecticut River R.R.*, 4 Cush. 63 (nuisance for locating track on portion of heavily traveled public way); *Commonwealth* v. *Nashua & Lowell R.R.*, 2 Gray, 54 (obstructing highway); *Commonwealth* v. *Hancock Free Bridge Corp.*, 2 Gray, 58 (nuisance for not keeping in repair road which was part of corporation franchise); *Commonwealth* v. *Proprietors of New Bedford Bridge*, 2 Gray, 339 (obstructing waterway by bridge without suitable draws); *Commonwealth* v. *Vermont & Mass. R.R.*, 4 Gray, 22 (nuisance relating to the construction of a grade crossing); *Commonwealth* v. *Old Colony & Fall River R.R.*, 14 Gray, 93 (gravel embankment within the limits of a highway). These cases were nothing more than a logical extension of earlier cases of the same sort relating to what were, in effect, private nuisances, see e.g., *Riddle* v. *Proprietors of the Locks & Canals on Merrimack River*, 7 Mass. 169 (trespass on the case for damage to a raft occasioned by the neglect of the proprietors to maintain canal deep and wide enough to allow raft to pass). Later cases are *Commonwealth* v. *Ober*, 286 Mass. 25, and *Commonwealth* v. *Mini-Cost Car Rental, Inc.*, 354 Mass. 746, where owners of automobiles were held liable for violations of parking regulations, even though the violations apparently occurred without their knowledge.

Court of the United States upheld the constitutionality of a statute which specifically made corporations liable for the acts of their officers, agents or employees acting within the scope of their employment. The statute in question prohibited shippers from receiving rebates from common carriers and specifically provided as follows: "In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person." 32 Stat. 847-848, § 1. Citing the *Telegram* case, 172 Mass. 294, *supra*, among others, the court made a number of pertinent observations and rulings from which we quote at some length: "A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the agent has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act. . . . We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that inter-

state commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at." Pp. 493-496. The court concluded that "[a]pplying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises." *Supra*, p. 494.

Household argues that the *New York Central* case is one in which Congress clearly dispensed with the necessity of proving corporate intent and is therefore distinguishable from the case before us. While we agree that the thrust of the opinion in that case is addressed to the constitutionality of the statutory imputation of the agent's acts to the corporation, we think that the case falls outside the class of offenses generally denominated as "public welfare" offenses and is akin to the *Telegram* case in that it serves as precedent for the proposition that a corporation may be held criminally responsible for the acts of one who is neither a director, officer nor "high managerial agent" of the corporation. In this regard, the case illustrates the public policy rationale for imposing vicarious liability upon a corporation and thus warranting the treatment of corporation in a manner different from that of individuals for the acts of their agents. This rationale was subsequently developed and applied in lower Federal court cases which dealt with crimes requiring specific intent. These cases are discussed *infra* and each cited and applied the rule of the *New York Central* case.

In the often cited case of *Egan* v. *United States*, 137

F.2d 369, 379 (8th Cir.), a case similar in many aspects to the ones before us, a public utility holding corporation and its president were convicted of conspiracy to violate statutes prohibiting public utilities from making political contributions. The corporation attacked the sufficiency of the evidence to impute criminal responsibility to it on the ground that the acts of its officers in making the political contributions were not shown to be authorized by the corporation either by an express or an implied act of the board of directors. In its opinion, the court set forth the gist of the judge's charge to the jury and noted that this charge was "manifestly based upon the opinion of the Supreme Court in *New York Cent. & H. R. R. Co.* v. *United States*, 212 U. S. 481 ...." Upholding the instructions to the jury, the court said: "The test of corporate responsibility for the acts of its officers and agents, whether such acts be criminal or tortious, is whether the agent or officer in doing the thing complained of was engaged in 'employing the corporate powers actually authorized' for the benefit of the corporation 'while acting within the scope of his employment in the business of the principal.' If the act was so done it will be imputed to the corporation whether covered by the agent or officer's instructions, whether contrary to his instructions and whether lawful or unlawful.... The court is not concerned with whether political contributions were authorized by a resolution of the board of directors or acquiesced in by a majority of the board. Our inquiry concerns only the powers of the corporation, the business it was authorized to carry on in the exercise of those powers, and whether the officers of the company in making political contributions were engaged in carrying out that business within the scope of their official duties." *Egan* v. *United States*, *supra*, at 379.

Another Federal case applying the above standard is *C. I. T. Corp.* v. *United States*, 150 F. 2d 85 (9th Cir.). This case is significant in that a large national money lending

corporation was held criminally responsible for the criminal acts of a minor branch manager. The corporation was convicted of conspiracy to make false credit statement applications to the Federal Housing Administration, a crime which under the statute specifically required the element of knowledge. On appeal, the corporation argued that the branch manager was too low in the corporate hierarchy and that he had no corporate power to commit the acts complained of with the criminal intent imputable to the corporate entity. In refuting this argument the court said: "We do not agree. It is the function delegated to the corporate officer or agent which determines his power to engage the corporation in a criminal transaction." p. 89. The court then discussed the delegation of authority to the branch manager and after quoting at length from the *New York Central* case, observed that although that case required no showing of a criminal intent, "*the principle it states has been accepted in the circuits as controlling in corporate crimes in which intent is an essential factor*" (emphasis supplied). *Supra*, at 90. The court then cited various cases from different circuits and specifically ruled that "[w]e do not regard any of these cases distinguishable from the instant case because the corporate function criminally performed was vested in an agent of higher dignity than the salesman in the" case of *Zito* v. *United States*, 64 F. 2d 772, 775 (7th Cir.), or than the branch manager in the present case, *C. I. T. Corp.* v. *United States*, *supra*, 150 F.2d at 90. It should be noted that in the *Zito* case, *supra*, where a corporation was convicted of conspiracy to violate the National Prohibition Act, the acts of a salesman were imputed to the corporation solely on the basis that he was an agent of the corporation and had authority to sell its products.

The standard applied in the above cases clearly focused on the scope of authority of the agents to act in the narrow

sphere of corporate business relating to the criminal act. This essential consideration was succinctly set forth in somewhat different terms in the case of *United States* v. *Nearing,* 252 Fed. 223, 231, (S.D.N.Y.) wherein Judge Learned Hand stated that "the criminal liability of a corporation is to be determined by the *kinship of the act to the powers of the officials, who commit it*" (emphasis supplied). In the *Nearing* case, the corporation was indicted for conspiracy to violate the Espionage Act through the publication of a pamphlet calculated to cause insubordination in the armed forces. In a pre-trial opinion discussing the sufficiency of the indictment, Judge Hand made the following orbservations: "Finally, the defendants urge that a corporation cannot be guilty of the crime of conspiracy, or of any crime involving specific intent. This question simply turns upon how far the law has gone in imputing to a corporation the acts of its agents.... Now, there is no distinction in essence between the civil and the criminal liability of corporations, based upon the element of intent or wrongful purpose. Each is merely an imputation to the corporation of the mental condition of its agents."

We treat the *Egan, Nearing* and *C. I. T.* cases as strong precedent for the rule that a corporation is criminally liable for the acts of an agent who has been vested with the authority to act on behalf of the corporation in the sphere of corporate business in which he commits the criminal act. Numerous other Federal cases have been brought to our attention which also support this rule. Some of these are the following: *United States* v. *Van Riper,* 154 F. 2d 492, 493 (3d Cir.) (manager of gas station — violation of price control regulations established under War Powers Act); *United States* v. *George F. Fish, Inc.,* 154 F. 2d 798, 801 (2d Cir.), cert. den. 328 U.S. 869 (salesman — knowing violation of Emergency Price Control Act of 1942); *United States* v. *Armour & Co.* 168 F. 2d 342, 343-

344 (3d Cir.) (salesmen at 3 Pennsylvania branches, branch manager at Norristown, and assistant manager at Noble Street, Philadelphia — violation of regulations promulgated under the Emergency Price Control Act prohibiting tie-in sales); *United States* v. *Steiner Plastics Mfg. Co., Inc.* 231 F. 2d 149, 153 (2d Cir.) (production manager or either of 3 factory employees — conspiracy to falsify approval stamps on fighter plane cockpit canopies being manufactured for the Navy and actual falsification of them); *United States* v. *Milton Marks Corp.* 240 F. 2d 838, 839 (3d Cir.) (general foreman — knowingly presenting a false claim to the United States); *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 148-151 (6th Cir.) (plant manager at Memphis, Tennessee, depot managers and supervisors — conspiracy to fix the prices of bakery products in the Memphis area — Sherman Act); *United States* v. *American Stevedores, Inc.* 310 F. 2d 47, 48 (2d Cir.), cert. den. 371 U. S. 969 (comptroller — tax evasion); *Steere Tank Lines, Inc.* v. *United States*, 330 F. 2d 719, 720-724 (5th Cir.) (truck drivers and dispatchers — knowing falsification of records by motor carrier); *United States* v. *American Radiator & Standard Sanitary Corp.* 433 F. 2d 174, 204-205 (3d Cir.) (sales manager — conspiracy to fix prices of plumbing fixtures — where the court specifically approved a charge essentially identical to that in the present case).

Household, Beneficial and Liberty all vigorously attack these cases in an attempt to distinguish them from the cases before us. The thrust of their argument is that all of these cases fall into 1 or 2 categories; either they involve public welfare and regulatory statute crimes in which intent was not an element, or if the crimes did include intent as a necessary element, then they assert that the corporations were only held liable if one high in the corporate hierarchy directed, approved or acquiesced in the agent's criminal act. In support of this argument, Household cites

several law review articles in which their authors have attempted to categorize these cases in a similar manner.[57]

We think that the answer to these contentions is two-fold. First, the defendants' attempted categorization of the above cases into two neat little groups greatly over-simplifies the complex and multifaceted issues which confronted the various courts in the cases we have cited. The principal cases of *Egan, C. I. T.,* and *Nearing* all entail prosecutions for the crimes of conspiracy, a crime requiring specific intent. In addition, the object of the conspiracies in these cases involved a wide scope of serious criminal activity, usually in matters tending to be of benefit to the corporation, extending from violations of the Espionage Act in the *Nearing* case, through the making of illegal political contributions in the *Egan* case, various types of fraudulent acquisitive crimes in the cases of *C. I. T., Steiner Plastics, Milton Marks,* and *American Stevedores,* and conspiracy to violate the Sherman Act through price fixing in the cases of *Continental Baking Co.* and *American Radiator.* Furthermore, as we previously noted, even if the statute in the *New York Central* case dispensed

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[57] The defendants appear to principally rely on the Note, Criminal Liability of Corporations for Acts of Their Agents, 60 Harv. L. Rev. 283, 289, and on the Note, Corporate Criminal Liability for Acts in Violation of Company Policy, 50 Georgetown L. J. 547, 549, to substantiate the categorizations made above. The question of corporate criminal responsibility has of course been discussed extensively by text writers and in law reviews. See Anderson, Wharton's Criminal Law & Procedure, § 52, p. 120; Fletcher, Cyc. Corporations (Rev. Ed.) § 4959; Lee, Corporate Criminal Liability, 28 Col. L. Rev. 1; Edgerton, Corporate Criminal Responsibility, 26 Yale L. J. 827; Mueller, Mens Rea and the Corporation, A Study of the Model Code Position on Corporate Criminal Liability, 19 U. of Pittsburgh L. Rev. 21. The Mueller article, which is also heavily relied on in support of the defendants' view of the Model Penal Code standard, does, however, make the following statement in referring to "high managerial agents." "Not the mode of acquisition of a corporate office but the scope of trust and power is the proper criterion." Mueller, *supra,* at 40. We think this test is easily equated to the "scope of authority" or "kinship of authority to the act" test employed by the judge.

with the necessity of proving corporate intent, the *Egan* case and other Federal cases specifically expanded the rule of that case to cases involving crimes requiring specific intent. Secondly, the argument that only high corporate officers were involved has no basis in fact. In the *C. I. T. case,* a minor branch manager was involved, and in the *Zito* case, a salesman. In addition, although the criminal acts in the *Egan* case were performed by an officer of the corporation, the court consistently stressed, as is shown from the language previously quoted, that the corporation could be held responsible for the acts of either officers or agents. Indeed, the court emphatically stated that the focal point of inquiry is not whether corporate authorization or participation was shown in the upper echelon of the corporate ranks, but whether the agent or officer in doing the criminal act "was engaged in 'employing the corporate powers actually authorized' for the benefit of the corporation 'while acting within the scope of his employment in the business of the principal.'" p. 379 of 137 F.2d.

Household argues that in applying the foregoing standard of corporate criminal responsibility, we are merely applying the rule of respondeat superior as it is applied in civil cases and that we are "reaching out to state a completely new rule of law." We agree that the above cases, as well as the judge's instructions to the jury, essentially employ the rationale underlying the doctrine of respondeat superior. However, we do not agree that application of this doctrine to a criminal case involving specific intent is a "completely new rule of law." The courts in the *New York Central* case and the other Federal cases cited above, especially in the *Egan* case, unequivocally focus their inquiry on the scope of authority which the corporation has conferred upon its agents to act on behalf of the corporation in managing the particular activities

in which the agents were engaged when they committed the criminal act. p. 379.

It may be that the theoretical principles underlying this standard are, in general, the same as embodied in the rule of respondeat superior. Nevertheless, as we observed at the outset, the judge's instructions, as a whole and in context, required a greater quantum of proof in the practical application of this standard than is required in a civil case. In focusing on the "kinship" between the authority of an individual and the act he committed, the judge emphasized that the jury must be satisfied "beyond a reasonable doubt" that the act of the individual "*constituted*" the act of the corporation. Juxtaposition of the traditional criminal law requirement of ascertaining guilt beyond a reasonable doubt (as opposed to the civil law standard of the preponderance of the evidence), with the rule of respondeat superior, fully justifies application of the standard enunciated by the judge to a criminal prosecution against a corporation for a crime requiring specific intent.

The foregoing is especially true in view of the particular circumstances of this case. In order to commit the crimes charged in these indictments, the defendant corporations either had to offer to pay money to a public official or conspire to do so. The disbursal of funds is an act peculiarly within the ambit of corporate activity. These corporations, by the very nature of their business are constantly dealing with the expenditure and collection of moneys. It could hardly be expected that any of the individual defendants would conspire to pay, or would pay, the substantial amount of money here involved, namely $25,000, out of his own pocket. The jury would be warranted in finding that the disbursal of such an amount of money would come from the corporate treasury. A reasonable inference could therefore be drawn that the payment of such money by the

corporations was done as a matter of corporate policy and as far as a reflection of corporate intent, thus comporting with the underlying rationale of the Model Penal Code, and probably with its specific requirements.

Moreover, we do not think that the Model Penal Code standard really purports to deal with the evidentiary problems which are inherent in establishing the quantum of proof necessary to show that the directors or officers of a corporation authorize, ratify, tolerate, or participate in the criminal acts of an agent when such acts are apparently performed on behalf of the corporation. Evidence of such authorization or ratification is too easily susceptible of concealment. As is so trenchantly stated by the judge: "Criminal acts are not usually made the subject of votes of authorization or ratification by corporate Boards of Directors; and the lack of such votes does not prevent the act from being the act of the corporation."

It is obvious that criminal conspiratorial acts are not performed within the glare of publicity, nor would we expect a board of directors to meet officially and record on the corporate records a delegation of authority to initiate, conduct or conclude proceedings for the purpose of bribing a public official. Of necessity, the proof of authority to so act must rest on all the circumstances and conduct in a given situation and the reasonable inferences to be drawn therefrom.

Additional factors of importance are the size and complexity of many large modern corporations which necessitate the delegation of more authority to lesser corporate agents and employees. As the judge pointed out: "There are not enough seats on the Board of Directors, nor enough offices in a corporation, to permit the corporation engaged in widespread operations to give such a title or office to every person in whom it places the power, authority, and responsibility for decision and action." This latter con-

sideration lends credence to the view that the title or position of an individual in a corporation should not be conclusively determinative in ascribing criminal responsibility. In a large corporation, with many numerous and distinct departments, a high ranking corporate officer or agent may have no authority or involvement in a particular sphere of corporate activity, whereas a lower ranking corporate executive might have much broader power in dealing with a matter peculiarly within the scope of his authority. Employees who are in the lower echelon of the corporate hierarchy often exercise more responsibility in the *everyday operations* of the corporation than the directors or officers. Assuredly, the title or office that the person holds may be considered, but it should not be the decisive criterion upon which to predicate corporate responsibility.

The validity and soundness of these considerations are especially reflected in the activities of public relations men in the employ of many large corporations. This is graphically illustrated in the *Egan* case, 137 F. 2d 369, *supra*. That case is particularly applicable to the ones before us because of its inquiry into the type of authority exercised by the officers and agents who made the political contributions for which their corporations were held responsible. The court characterized the activities of these agents as being "authorized public relations activities ... within the defendant corporation's powers." In reviewing the evidence relating to this type of authority, the court highlighted the following factors: "The evidence shows that the corporation in the exercise of this power regards its public relations and its good will as matters of great importance. It has a right to do so and it does send its officers to appear before legislative committees to influence those legislatures and to persuade them to pass laws advantageous to the company's interest and to reject pro-

posed laws inimical to its interest. In the exercise of its powers, it has a right to do so and it does send its officers to state capitals to influence the individual members of the legislatures to be friendly to its interests. It sends its officers to appear before state and municipal boards and officers having power to impose taxes upon its property for the purpose of presenting arguments and data in its interest. To cultivate and develop the friendship of its patrons, prospective patrons, legislators and taxing authorities the company gives entertainments for invited guests including legislators, members of tax boards, patrons and others whose friendship it deems important. It maintains a 'lodge' at the lake above its dam in the Ozark Mountains to which it invites for free entertainment state officers and candidates for office."

The similarity between the kinship of authority and the acts of the agents in the *Egan* case with the kinship between the acts and authority of the individuals in the present cases is striking. It approaches the incredible for us to conclude from the evidence in the instant case that the public relations men, in their constant and prolonged communications with Hanley, were engaging in independent endeavors. The inference is obvious that their concerted activities along the lines outlined in our summary of the facts could not have been carried on without the knowledge or at least the reckless toleration of highly placed corporate executives.

To permit corporations to conceal the nefarious acts of their underlings by using the shield of corporate armor to deflect corporate responsibility, and to separate the subordinate from the executive, would be to permit "endocratic" corporations to inflict widespread public harm without hope of redress. It would merely serve to ignore the scramble and realities of the market place.[58] This we

[58] The term "endocratic" was coined by Dean Rostow and means a "large, publicly-held corporation, whose stock is scattered in small

decline to do. We believe that stringent standards must be adopted to discourage any attempt by "endocratic" corporations' executives to place the sole responsibility for criminal acts on the shoulders of their subordinates.

We believe that our decision is supported by basic considerations of public policy. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report — Crime and Its Impact — An Assessment (1967) provides a sound rationale for imputing criminal responsibility to the corporation for the acts of lower echelon corporate officials who have the authority to act on behalf of the corporation. The report states at p. 104 that "[w]hite collar crime also does serious damage to social and economic institutions.... Thus, crimes such as bribery and violation of conflict of interest statutes strike deeply at responsible, impartial government." The report further points out at p. 108 that: "A pervasive problem affecting enforcement is the fact that white collar crime is often business crime and business crime is often corporate crime. Where corporate defendants are involved, the only criminal sanction available is the fine. As noted previously, fines may be inadequate as deterrents for a variety of reasons. There are also serious practical problems in imposing sanctions upon corporate employees. It is very difficult to obtain the conviction of the true policy formulators in large, complex corporations. The top executives do not ordinarily carry out the overt criminal acts—it is the lower or middle management officials who, for example, attend price-fixing meetings." The President's Commission concluded, at p. 108, that: "where corporate misconduct is involved, the offenders—and particularly the offenders against whom evidence of guilt can be obtained—act as part of a corporate hierarchy and, or-

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fractions among thousands of stockholders." Note, Increasing Community Control Over Corporate Crime — A Problem in the Law of Sanctions, 71 Yale L. J. 280, 281, n. 3.

dinarily, follow a pattern of corporate behavior. Individual responsibility is therefore reduced—the offenders are often following orders from above, either explicit or implicit. Moreover, the fact that acts are performed to further the interests of the corporation, and not merely the offenders' personal interests, helps to rationalize misconduct. Thus in the *Electrical Equipment* cases, personal explanations for the acts were, for the most part, sought in the structure of corporate pressures. The defendants almost invariably testified that they came new to a job, found price-fixing an established way of life, and simply entered into it as they did into other aspects of their job."[59]

The above considerations seem to us to support the principles stated in the judge's charge for adjudicating the criminal responsibility of these corporate principles. We are aware that *some* jurisdictions and legal writers have

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[59] The public policy rationale underlying our decision is also illustrated in a recent article by Professor Alan M. Dershowitz. He discusses the effect of criminal sanctions on the treasuries of large "endocratic" corporations. He states that "[t]he criminal fine as presently administered against the endocratic corporation guilty of acquisitive crime is thus little more than 'a reasonable license fee' for engaging in such conduct and may be practically ignored as *de minimis* in an analysis of the profit diminishing effect of present sanctions." Note, Increasing Community Control Over Corporate Crime — A Problem in the Law of Sanctions. 71 Yale L. J. 280, 287. The article goes on to refer to "the presently insubstantial nature of the criminal fine" and "the difficulty of pinpointing guilt above the level of overt actors, the real formulators of endocratic corporate policy have little cause to fear corporate penalties. These phenomena help to explain why, in the area in which effective criminal sanctions *should* achieve the highest degree of overall deterrence, they are essentially ineffective, as evidenced by the startling rate of acquisitive crime recidivism among endocratic corporations." *Id.* at 293, citing Sutherland, White Collar Crime, 25. After analyzing criminal anti-trust cases in which the scope of authority test is well established, Dershowitz concludes that greater penalties are necessary in order to obtain adequate deterrence. We, of course, have no occasion to express an opinion concerning any administrative action which may follow as a consequence of convictions in these cases.

approved the Model Penal Code,[60] even as contained in the 1955 draft. Indeed, the 1955 comments on the Code (prior to the addition of the significant words "or recklessly tolerated") merely say that the limitations on corporate liability there set out are "generally consistent with the position of the English courts and those of *some* American States" (emphasis supplied). Model Penal Code, § 2.07, comment p. 151 (Tent. Draft No. 4, 1955).[61] This may mean that the majority of jurisdictions in this country do not adhere to the standard proposed in 1955.

One such State appears to be Wisconsin. For example, in the case of *Vulcan Last Co.* v. *State,* 194 Wis. 636, a corporation was convicted of violating a statute which prohibited employers from attempting to influence the votes of employees through threats of discharge or reduction of wages. The corporate employee involved was a superintendent. In refuting the argument that the corporation could not be held responsible for the conduct of the superintendent the court stated: "Corporations must of necessity act through their agents. When these agents act within the scope of their authority their acts are the acts of the corporation, for which the corporation is liable both civilly

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[60] Statutes recently enacted in New York, Georgia and Illinois have adopted similar standards. See New York Penal Law, c. 40 of Consolidated Laws, Title B, art. 20, § 20.20, Amendment, Laws of 1965, c. 1030. Illinois Crim. Code, c. 38, Title II, art. 5, § 5-4. Georgia Code Anno. Title 26, § 26-803 (1969). Legal writers indorsing the Model Penal Code standard or something analogous thereto are Mueller, Mens Rea and the Corporation, A Study of the Model Code Position on Corporate Criminal Liability," 19 U. of Pittsburgh L. Rev. 21, 41 (high managerial agents or "inner circle"), Winn, The Criminal Responsibility of Corporations, 3 Cambridge L. J. 398, 414 ("primary representatives"), and Welsh, The Criminal Liability of Corporations, 62 L. Q. Rev. 345, 362 ("governing body"). See fn. 57, *supra.*

[61] English cases in support of the underlying rationale of the Code include *Director of Pub. Prosecutions* v. *Kent & Sussex Contractors, Ltd.* [1944] 1 K. B. 146, 155-156, *Rex* v. *I. C. R. Haulage, Ltd.* [1944] 1 K. B. 551, and *John Henshall (Quarries) Ltd.* v. *Harvey* [1965] 2 Q. B. 233, 241.

and criminally. *If the acts are within the scope of the authority* of the agent, the corporation is liable criminally for the *acts although the acts may not have been expressly authorized by the corporation*, even if the corporation has expressly forbidden its agent to act in the manner that made it answerable to punishment under the criminal law" (emphasis supplied). p. 643.

Other States have taken a similar view or have employed language consistent with that of the *Vulcan* case. These include the following: *State* v. *Lehigh Valley R.R.* 90 N. J. L. 372, 92 N. J. L. 261, affd. 94 N. J. L. 171, 175(manslaughter); *State* v. *Western Union Tel. Co.* 13 N. J. Super, 172, 221, affd. 12 N. J. 468, app. dism. 346 U.S. 869 (bookmaking); *State* v. *Salisbury Ice & Fuel Co.* 166 N.C. 366, 367 (false pretences); *State* v. *Eastern Coal Co.* 29 R.I. 254, 265-269 (criminal conspiracy).

Cases relied upon by the defendants which apparently support what they conceive as the Model Penal Code principle are *Grant Bros. Constr. Co.* v. *United States*, 13 Ariz. 388, and *People* v. *Canadian Fur Trappers Corp.* 248 N.Y. 159. Particular emphasis is placed on the *Canadian Fur Trappers'* case for the proposition that a corporation can be held criminally responsible "only for acts which it authorizes through action of its officers or which . . . [are] done with the acquiescence of its officers." 248 N.Y. at 164. It should be noted, however, that the *Canadian Fur Trappers'* case involved a closely held corporation in which four brothers "constituted the corporation and were its only officers." P. 165. Thus, the court in that case had only to confine its opinion to the acts of individuals who were, in fact, the corporation. See fn. 62, *infra*. It seems appropriate to distinguish a situation of that kind from large, endocratic corporations such as are involved in the present case.

Considering everything we have said above, we are of

opinion that the quantum of proof necessary to sustain the conviction of a corporation for the acts of its agents is sufficiently met if it is shown that the corporation has placed the agent in a position where he has enough authority and responsibility to act for and in behalf of the corporation in handling the *particular* corporate business, operation or project in which he was engaged at the time he committed the criminal act. The judge properly instructed the jury to this effect and correctly stated that this standard does not depend upon the responsibility or authority which the agent has with respect to the entire corporate business, but only to his position with relation to the particular business in which he was serving the corporation. Some of the factors that the jury were entitled to consider in applying the above test, although perhaps not in themselves decisive, are the following: (1) the extent of control and authority exercised by the individual over and within the corporation;[62] (2) the extent and manner to which corporate funds were used in the crime;[63] (3) a repeated pattern of criminal conduct tending to indicate corporate toleration or ratification of the agent's acts.[64] Applying these criteria within the "kinship of the act to authority" test to the

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[62] With regard to a small closely held corporation, in which the individual *is* the corporation, this factor may be considered somewhat decisive. Cf. *Mininsohn* v. *United States*, 101 F. 2d 477 (3d Cir.); *Old Monastery Co.* v. *United States*, 147 F. 2d 905, 908 (4th Cir.); *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 19 (7th Cir.); *People* v. *Canadian Fur Trappers Corp.*, 248 N.Y. 159, 164; *State* v. *Graziani*, 60 N. J. Super. 1, cert. den. 363 U.S. 830.

[63] *Egan* v. *United States*, 137 F. 2d 369, 379 (8th Cir.), cert. den. 320 U.S. 788. *United States* v. *Carter*, 311 F. 2d 934 (6th Cir.). *United States* v. *Knox Coal Co.*, 347 F. 2d 33, 40-41 (3d Cir.). Use of corporate funds has been noted to be evidence of ratification in *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 149 (6th Cir.).

[64] Cf. *Continental Baking Co.* v. *United States*, *supra*; *United States* v. *Knox Coal Co.*, *supra*; *People* v. *Canadian Fur Trappers Corp.*, *supra*, at 164.

present case we next consider the evidence admitted against Household, then Liberty, and lastly, Beneficial.

2. *Household* — Household argues that even applying the "kinship of authority" test to the present case, there is no basis on which the trial court could justify the conclusion that either Pratt or Barber had enough power, duty, responsibility or authority, in handling the matters concerning the Rate Board or involving Hanley in his official capacity, to make the statements and acts of these employees binding upon the corporation.

The judge, without reciting the evidence concerning the relationship between Barber, Pratt and Household, simply ruled that a finding was warranted that the "relationship disclosed by the evidence, whether it be of agency, employment, or office holding, or a combination of them, existed ... between the individuals Barber and Pratt and the corporation *Household*," and that the "statements, acts and conduct of the individual defendants Pratt and Barber ... were done and performed by them for and in behalf of *Household*, within the scope of their authority to act for and in behalf of *Household*, and were otherwise in all respects such that they were and constituted the statements, acts and conduct of *Household*."

We agree with the judge that there was sufficient evidence of authority to submit the case to the jury. The evidence shows that Household is a Delaware corporation, engaged in lending money, with its national headquarters and principal place of business in Chicago, Illinois. Household is divided into various geographical divisions as well as into departments and sub-departments. Among the major departments of Household are those described as "Operations," "Advertising," "Auditing" and "Public Relations." The New England area, including Massachusetts, is termed the "Northern Division" within Household's geographical schema. In this area, Household had 91 loan offices. Forty of these were located in Massachusetts.

During the years involved in this case, the "Northern Division" was under the supervision of one Don H. Ellis, a vice-president and "director of supervision" of Household. Ellis testified that although his duties primarily involved "operations," a "Department that serves the public by making loans and collecting the money back," there is communication within the corporate structure between 1 department and another. For example, if the advertising department was conducting activities in the "Northern Division," then Ellis would be so informed.

The director of public relations for Household during the period covered by these indictments was one Harold Haugan. Haugan, like Ellis, was a vice-president of Household, and was so listed on Household's annual report to its stockholders. As director of public relations, it appears that Haugan was equal or superior to Ellis in the corporate hierarchy. The annual report lists the names of these 2 men in such a fashion as to warrant this inference. On the same page of the annual report, just below the listing of the corporate vice-presidents, there is a list of "Other Staff Executives." The defendant Barber is listed among these executives. The annual report also designates Barber as "Divisional Director" of "Public Relations." From the positioning of Barber's name in the annual report, a jury would be warranted in drawing the inference that Barber's status in the corporate hierarchy was comparable to that of Household's controller. In addition, there was evidence that Barber attended a high level executive conference, which was held annually in Fort Lauderdale, Florida.

The defendant Pratt was one of Haugan's subordinates in the public relations department. It is apparent that Pratt was also subordinate to Barber and the jury would have been warranted in so inferring. Household hired Pratt in 1957. He commenced work in the public relations department in 1959. Pratt covered the New England area of

Household's public relations activities and worked in Massachusetts.

Among the duties of Household's public relations men was to "enhance the image of the company." In its general instructions manual, Household counseled its employees to refer problems involving persons in "public life" to the public relations department. Ellis testified that this manual states that "if there is a problem that involves a person in public life, an influential person, you name him, anybody ... who is antagonistic towards the industry ... then we refer it to the Public Relations Department."

The Commonwealth argues that the above evidence, specifically concerning Barber's rank in the corporate hierarchy, is sufficient to meet the "high managerial agent" test proffered by Household; that Barber is a "high managerial agent" whose acts, knowledge and admissions constitute the acts, knowledge and admissions of Household. We need not decide whether this evidence, specifically that which may be inferred from the annual report, sufficiently delineates Barber's power and authority within the corporate structure to warrant the conclusion that all requisites of the Model Penal Code standard as construed by the defendants are fulfilled. However, we are of opinion that it could have been found that Barber's authority within the public relations department as "divisional director" clothed him with sufficient authority to deal with Hanley in Hanley's capacity as supervisor of loan agencies. The very nature of public relations activities, together with the specific instructions in Household's manual to refer problems involving persons in "public life" or "influential persons" to the public relations department, warrants the conclusion that Barber and Pratt possessed the authority to deal with the Hanley "program." Cf. *Egan* v. *United States*, 137 F. 2d 369, 380 (8th Cir.).

The fact that there is evidence that the law department

of Household also dealt with the Rate Board proceedings of 1962 does not alter this result. The jury would be warranted in concluding from the testimony of Ellis that there was at least some degree of inter-departmental communication within Household's corporate structure. The fact that Household authorized its law department to deal with the Rate Board hearings did not preempt its public relations department from dealing personally with Hanley. It was within the province of the jury to decide whether Barber, in his position as "divisional director" and Pratt, in his position as Household's sole public relations man in Massachusetts, possessed a sufficient quantum of authority to deal with Hanley. All of the evidence recounted above warranted the submission to the jury of the acts and statements of the other conspirators. This evidence, in toto, more than justifies the conclusion that Household, through its employees Barber and Pratt, acting within the authority conferred on them, conspired to bribe Hanley and Garfinkle. Household's motion for a directed verdict on the conspiracy indictment was, therefore, properly denied.

3. *Liberty* — Liberty, like Household, argues that there is insufficient evidence of the defendant Woodcock's authority to act on its behalf in conspiring to bribe Hanley and Garfinkle. In view of what we have said with respect to Household, we are of opinion that, a fortiori, Liberty's argument is devoid of merit.

Liberty is a publicly held corporation, incorporated in the State of Delaware. It is the beneficiary of various Massachusetts business trusts conducting the small loans business in Massachusetts. Woodcock was 1 of Liberty's 2 executive vice-presidents and also 1 of its 11 directors. In 1960, Woodcock attended a series of meetings or hearings in Massachusetts involving changes in the regulations governing the supervision of the small loans industry by the small loans division. On September 8, 1961, the head

clerk of the small loans division returned certain surety bonds and small loans office license applications to Woodcock at Liberty's office in St. Louis. Three days later, on September 11, 1961, Woodcock wrote to the small loans division on stationery indicating that he was writing from Liberty's "Executive Offices" in St. Louis and in his official capacity as executive vice-president. On November 19, 1962, again in his capacity as executive vice-president, Woodcock wrote directly to Hanley informing him that Liberty's treasurer, O. H. Love, would appear on Liberty's behalf at the 1962 Rate Board hearings.

The foregoing evidence clearly demonstrates that Woodcock possessed sufficient authority to act on behalf of Liberty in dealing with Hanley and the Rate Board hearings. As a high corporate official, indeed 1 of its directors, Woodcock had dealings with the small loans department over a 3 year period, as well as dealings with Hanley directly. This evidence, together with the position he held in the corporate hierarchy, is sufficient to support a finding that Woodcock's acts, conduct and admissions were also those of Liberty. The fact that the Commonwealth did not produce evidence showing Woodcock's specific authorization to offer a bribe to Hanley is inconsequential. As we previously stated, evidence of specific prior authorization of criminal activity by the board of directors of a large publicly held corporation is not readily susceptible of investigation and discovery, nor is such authorization likely to have occurred. Even on the defendants' view of the Model Penal Code standard, which appears to be met in the case of Woodcock, such a quantum of proof would not be required.

The judge rightly admitted the acts and statements of the other conspirators against Liberty, and correctly denied Liberty's motion for a directed verdict on the conspiracy indictment.

4. *Beneficial* — The conviction of Beneficial presents a

more involved situation regarding the sufficiency of evidence than that of the other loan companies. This is due to the interlocking corporate structure of the "Beneficial Finance System" (a term used by Beneficial to describe itself and its wholly owned subsidiaries),[65] rather than the sufficiency of the evidence against Farrell and Glynn, both of whom were employees of the "System." Indeed, Farrell and Glynn emerge as 2 of the major proponents of the plot to bribe Hanley and Garfinkle, there being an overwhelming amount of evidence relative to the participation of each.

The evidence discloses that Farrell and Glynn were not formally the employees of the defendant Beneficial. Farrell was vice-president and director of Beneficial Management. Similarly, Glynn was employed by Beneficial Management and was formally on the payroll of Industrial Bankers, a Massachusetts business trust completely owned and controlled by Beneficial. In addition to Industrial Bankers, Beneficial fully owns and operates 2 other Massachusetts business trusts—New England Equity and Workingmen's Loan Association. These 3 trusts engage in the consumer loan business within the Commonwealth and operate a total of 58 licensed small loans offices. The parent, Beneficial, controls the appointment of the trustees and officers of the 3 trusts and provides them with the funds necessary for continued operation.

Beneficial Management also is a wholly owned subsidiary of Beneficial. Both corporations, parent and subsidiary, are Delaware corporations with their principal offices located in the Beneficial Building, 1300 Market Street, Wilmington 99, Delaware. Beneficial Management also has offices in Morristown, New Jersey. Beneficial Management provides

[65] Beneficial states that it "is proud of its long association with Boston .... The Beneficial Finance System has been serving Boston since 1920 and has more offices in the Boston metropolitan area than any other consumer finance organization."

auditing, accounting and legal services for these trusts. It is also its responsibility to distribute to the loan offices a detailed instruction book entitled "Beneficial Finance System, Service Staff Bulletins." This manual promulgates guidelines on the making and collecting of loans and the preparation of papers required by law. It is apparent that many of the officers and directors of Beneficial are also officers and directors of Beneficial Management.[96] In fact, Beneficial refers to the officers and key executives of Beneficial Management as "the men behind Beneficial." As a vice-president and director of Beneficial Management, the defendant Farrell is so listed.

The public relations area was handled for all of the individual Beneficial loan offices and business trusts in Massachusetts by the defendant, Glynn, Beneficial's director of industry relations. Although Glynn was on the payroll

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[96] The following chart compiled by the Commonwealth discloses a network of interlocking directorates and office holders within the Beneficial Finance "System."

	Beneficial	*Beneficial Management*	*Industrial Bankers*	*New England Equity*	*Workingmen's Loan Ass'n*	*28 Individual Licensees*
T.A. McGRATH	President	Director				
R.A. TUCKER	Vice-President	Director				
W.C. THOMPSON	Vice-President		Trustee	Trustee	Trustee	
A.H. STOUTHMAN	Secretary		Secretary	Secretary	Secretary	Secretary
O.W. CASPERSON	Director	Director				
R.G. DOHR	Director			President		
D.H. FISCH	Director	Director				
D.E. McMICHAEL	Director	President				
FRANK J. McCANN		Vice-President	Trustee	Trustee	Trustee	
D.J. PAUL	Director	Senior Vice President	Trustee			

of Industrial Bankers, he was not assigned to any particular office or department of Industrial Bankers; nor was he the subordinate of any employee of that trust. He did public relations work and reported principally to Farrell.

Glynn's activities included ingratiating himself with legislators and members of the small loans division. He entertained Hanley extensively. Glynn expedited the procurement of an additional license for Beneficial or the movement of one of its offices. His primary function was to "sell Beneficial's position on any policies, matters of legislation, anything affecting regulations with the Department [of Banking], anything affecting annual and monthly reports with the Department, anything affecting the increase in license fees of the Department."

It is clear from the above evidence concerning Glynn's duties and Farrell's position within the Beneficial Finance "System," that Farrell and Glynn possessed sufficient authority to at least act on behalf of Beneficial Management in dealing with Hanley particularly in connection with Rate Board hearings. In this regard, the evidence of Farrell and Glynn's authority to deal with such matters is even more conclusive than that admitted against Barber, Pratt and Woodcock in our holding Household and Liberty liable for the acts of their employees. Farrell's position and authority as vice-president and director of Beneficial Management raises the inference that he was sufficiently highly placed in the corporate hierarchy of Beneficial Management to permit the jury to find that he was a "high managerial agent" whose "conduct may fairly be assumed to represent the policy of the corporation." Model Penal Code, §2.07 (2) (c) (Proposed Official Draft). Farrell is pictured in Beneficial's annual report as 1 of "the men behind Beneficial" and his photograph appears on the page of that consolidated report devoted to Beneficial Management together with photographs of 2 other vice-presidents of Bene-

ficial Management. Thus, we find no difficulty in holding, either according to the standard adopted by the judge or that of the Model Penal Code, that it could have been found that the acts, statements and knowledge of Farrell and Glynn were those of Beneficial Management.

However, the principal issue confronting us here is whether the evidence was sufficient as matter of law to warrant a finding that Farrell and Glynn *acted within the authority granted to them by Beneficial.* Beneficial vigorously argues that this court should not disregard Beneficial Management as a corporate entity, should adopt its view of the Model Penal Code standard, and therefore should conclude that Farrell was not a high managerial agent of the parent, Beneficial. On the other hand, the Commonwealth argues that the pervasive control of Beneficial Management by Beneficial and the "use of the former entity by Beneficial solely for its own ends within the 'Beneficial Finance System' while representing to the public at large that such 'System' was a unitary, centrally controlled whole, and the delegation by Beneficial to Beneficial Management of the powers, duties, authority, and responsibilities for dealing with the Massachusetts small loans regulatory authorities," warrants looking through the corporate structure to the parent, Beneficial. The Commonwealth concludes that Farrell should be regarded as a "high managerial agent" of Beneficial whose actions bind that corporation.

Essentially, we are in agreement with the position of the Commonwealth. We concede that the law is well settled that the parent's ownership of the entire stock of its subsidiary as well as control over the latter's affairs do not, without more, warrant treating 2 separate and distinct corporate entities identically. *Berry* v. *Old So. Engraving Co.* 283 Mass. 441, 451. See *Brighton Packing Co.* v. *Butchers' Slaughtering and Melting Assn.*, 211 Mass. 398, 403, 404; *Browne* v. *Brockton Natl. Bank*, 305 Mass. 521, 530; *Galdi*

v. *Caribbean Sugar Co.*, 327 Mass. 402, 407-408. But it is also clear that "courts look through the corporate form to the individuals in order to protect the public, prevent a fraud, or to accomplish some other essential justice." *Hallett* v. *Moore*, 282 Mass. 380, 399, citing *J. J. McCaskill Co.* v. *United States*, 216 U.S. 504, 515. *Southern Pac. Co.* v. *Lowe*, 247 U.S. 330, 337. *Gulf Oil Corp.* v. *Lewellyn*, 248 U.S. 71. See *Star Brewing Co.* v. *Flynn*, 237 Mass. 213, 217; *New England Theatres, Inc.* v. *Olympia Theatres, Inc.*, 287 Mass. 485, 493; *Henry F. Michell Co.* v. *Fitzgerald*, 353 Mass. 318, 322.

In the recent decision of *My Bread Baking Co.* v. *Cumberland Farms, Inc.*, 353 Mass. 614, we held a corporation liable for the torts of various satellite corporations even though the principal corporation did not own stock in any of the affiliates. The evidence in that case revealed that one Haseotes was the secretary, treasurer and a stockholder of Cumberland Farms, Inc. The Haseotes family also owned all of the stock in numerous other corporations operating retail stores which sold the dairy products of Cumberland Farms, Inc. Although the satellite corporations were not the subsidiaries of Cumberland Farms, Inc., they all had the same officers, operated as a single enterprise from a single headquarters and used the name of Cumberland Farms, Inc. as a trade name. From this evidence we inferred that Haseotes was a dominant figure in the enterprise, and that the store managers of the various retail outlets followed his orders and acted as agents of the principal corporation. With reference to the question of when employees of 1 corporation may be treated as the agents of another, we said:

"A corporation or other person controlling a corporation and directing, or participating actively in (see *Refrigeration Discount Corp.* v. *Catino*, 330 Mass. 230, 234-236), its operations may become subject to civil or criminal liability

on principles of agency or of causation. See *Commonwealth* v. *Abbott Engr. Inc.*, 351 Mass. 568, 579-580. See also *Rock-Ola Mfg. Corp.* v. *Music & Television Corp.*, 339 Mass. 416, 422-423. This may sometimes occur where corporations are formed, or availed of, to carry out the objectives and purposes of the corporations or persons controlling them. See *Rice* v. *Price*, 340 Mass. 502, 511-512; *Centmont Corp.* v. *Marsch*, 68 F. 2d 460, 464-465 (1st Cir.), *cert. den.* 291 U.S. 680. See also *Finnish Temperance Soc. Sovittaja* v. *Finnish Socialistic Publishing Co.*, 238 Mass. 345, 354-356; *Henry F. Michell Co.* v. *Fitzgerald*, . . .[353 Mass.] 318, 321-322. The circumstances in which one corporation, or a person controlling it, may become liable for the acts or torts of an affiliate or a subsidiary under common control have been frequently discussed. Although common ownership of the stock of two or more corporations together with common management, standing alone, will not give rise to liability on the part of one corporation for the acts of another corporation or its employees, additional facts may be such as to permit the conclusion that an agency or similar relationship exists between the entities. Particularly is this true (a) when there is active and direct participation by the representatives of one corporation, apparently exercising some form of pervasive control, in the activities of another and there is some fraudulent or injurious consequence of the intercorporate relationship, or (b) when there is a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting." Pp. 618-619.

We are of opinion that the standards enunciated above apply with equal validity to the case before us. Here, there is a clear interpenetration of corporate officers and

directors between Beneficial and Beneficial Management. Beneficial's president, 2 vice-presidents, and 2 directors were all directors of Beneficial Management. One of the directors of Beneficial was the president and another was the senior vice-president, and a third was a vice-president of Beneficial Management. The duality of corporate authority in these top executives reflects the extent of control and participation exercised by Beneficial over Beneficial Management.

Also of significance is the fact that Beneficial owned all of the stock of Beneficial Management and supplied operating funds to it. Additionally, the business services furnished by Beneficial Management were provided essentially as a part of the business operations of Beneficial. In this regard, Beneficial Management emerges as but a division of the Beneficial Finance "System" and an adjunct to Beneficial. This mixture of business operations was considered important in the case of *United States* v. *Brown & Sharpe Mfg. Co.*, 141 F. Supp. 520, at p. 526 (D.R.I.) where the court said: "The mere fact that one corporation owns all of the capital stock of a subsidiary corporation, standing alone, is not enough to warrant the disregard of their separate legal entities or sufficient to establish the subsidiary as the agent of the parent corporation. More is required. But where it is also shown that the business conducted by the subsidiary is a part of the business of the parent corporation, and where such ownership of stock in a subsidiary is employed not for the purpose of participating in the affairs of the subsidiary in a manner normal and usual with stockholders but for the purpose of making it a mere agent or department of the parent corporation, the courts will look through the form to the realities of the relation between the corporations and will hold that in such cases the subsidiary is a mere agent or department for carrying on the business of the parent corporation." See *National*

Labor Relations Bd. v. *Deena Artware, Inc.*, 361 U.S. 398, 403, and *Joseph R. Foard Co. of Baltimore City* v. *State*, 219 Fed. 827, 829 (4th Cir.). In the case of *Sisco-Hamilton Co.* v. *Lennon*, 240 F. 2d 68, 69 (7th Cir.), it was also noted that the operations of each of 4 separate corporations were geared to the operations of the others. The court there stated: "The record demonstrates existence of four cognate corporations all geared to the activities of one another under the parent's control. Under this intimate relationship it would be unjust to fall back on sterile technicalities consisting only of identities of entities as the sole bar to recovery for negligence by one or more of the subsidiaries."

We regard the foregoing language particularly applicable to the circumstances before us. Beneficial Management was demonstrably "geared" to the operations of Beneficial as well as those of the 3 Massachusetts trusts. This factor was considered in the *My Bread* case, 353 Mass. 614, where we referred to "a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities." P. 619.

We also consider noteworthy the fact that the entire consumer finance business of Beneficial was operated under the name of Beneficial Finance Company. It seems obvious that Beneficial derives a substantial amount of publicity and good will by representing to the public and its shareholders that it operates as a single, integral, mutually supporting entity. The *My Bread* case also noted this factor in ascertaining an agency relationship between many apparently distinct corporations. *Supra*, at 620. See *National Labor Relations Bd.* v. *Deena Artware, Inc.*, 361 U.S. 398, 403.

Beneficial argues that the standards enunciated in the *My Bread* case "may be justifiable in a civil suit for damages" but that they "should not apply in a criminal case" where a defendant "is entitled to a presumption of inno-

cence and the burden [is] on the prosecution to prove the defendant's guilt beyond a reasonable doubt."

The fact that this is a criminal case does not alter our view nor does it warrant adopting a rule different from that in the *My Bread* case. The traditional protection afforded a criminal defendant by placing the burden on the prosecution to prove guilt beyond a reasonable doubt and by clothing the defendant with a presumption of innocence is not undermined by subjecting a parent corporation to criminal responsibility on the grounds that it fully controls and participates in the operations of its subsidiary which commits the criminal act. This is the rule of our cases and it was so cited in the *My Bread* case. In the *My Bread* case, citing *Commonwealth* v. *Abbot Engr. Inc.*, 351 Mass. 568, 579-580 (a criminal case concerning larceny by false pretences), we said that "[a] corporation ... controlling a corporation and directing, or participating actively in ... its operations may become subject to *civil or criminal liability* on principles of agency or of causation" (emphasis supplied). *My Bread, supra,* at 618. See *Commonwealth* v. *Welansky,* 316 Mass. 383, 402; *Commonwealth* v. *Nichols,* 10 Metc. 259; *Commonwealth* v. *Riley,* 210 Mass. 387, 395-396.

Thus, we discern no valid reason for not applying the standards of the *My Bread* case in looking behind the corporate structure of the defendant Beneficial. The interest of the Commonwealth in protecting itself and its citizens from the criminal acts of foreign corporations is of much greater importance than the right of 1 person to pursue a civil remedy against a foreign corporate defendant. The inherent power of the Commonwealth to prosecute those who violate the law, whether they be individuals or corporations, dictates that such offenders should not be permitted to insulate themselves from criminal prosecution by shielding themselves behind instrumentalities which they promulgate to

conceal their criminal acts. This is especially true of large endocratic corporations which are structured to enable them to create a flow of authority from the upper echelons of directors and officers to lower ranks of corporate executives. Such a structure makes the responsibility for a criminal act more easily susceptible of concealment. Even greater beclouding of responsibility by a corporate principal takes place where a corporation such as Beneficial creates subsidiaries and business trusts to carry out its everyday administration and business operations. We find it appalling to allow such a corporate structure to shield those corporate entities which directly or indirectly receive the monetary benefits of criminal activity and at the same time avoid the sanctions which may be imposed upon those corporate employees who commit the actual criminal act.

In view of everything we have said above, we hold that there is sufficient evidence to support a finding that there existed between the defendants Farrell and Glynn and the corporation Beneficial Management a relationship of agency with the corporation Beneficial which empowered Farrell and Glynn to act on behalf of Beneficial in dealing with Hanley in his official capacity and also in connection with the Rate Board proceedings. Beneficial's motion for a directed verdict on the conspiracy indictment was properly denied.

D. Conduct of the First Trial.

Various defendants assert that certain features of the judge's conduct of the trial constituted reversible error.

1. Several of these arguments relate to the judge's handling of the jury. First, Household urges that the judge took insufficient precautions to guard the jury against the possible adverse effects of certain publicity, both before and during the trial. Pratt and Barber join in these arguments.

Shortly before the selection of the jury, the Commonwealth elected to "nolle pross" 2 indictments against

Edward A. Counihan, Third, then the Commisisoner of Banks. Assistant Attorney General Travers stated that the indictments were "nolle prossed" because a codefendant had decided not to supply the Commonwealth with testimony essential to proof of guilt under the indictments. The Boston Globe and the Boston Traveler on that day carried stories concerning the "nolle pross," and quoted Mr. Travers' statement. Motions for a continuance and for a mistrial were denied. The rulings were within the discretion of the judge, particularly in the absence of a clear showing of prejudice.

During the empanelling of the jury, it became apparent that some of the veniremen had formed opinions with respect to the case on the basis of pre-trial publicity, and had discussed the matter among themselves. The judge inquired, inter alia, of each prospective juror whether he or she (1) had any interest in the case, or in its result; (2) had formed or expressed any opinion as to the innocence or guilt of any of the defendants; (3) was conscious of any bias or prejudice as to the case or as to any of the parties for any reason whatever; and (4) was sensible of any bias or prejudice as to loan companies or finance companies. The judge eventually excused 100 jurors for cause.

Household moved that the judge further poll the prospective jurors to determine (1) what, if anything, they had read concerning the trial; (2) what had occurred during pre-trial discussions among the veniremen; and (3) whether such reading or discussion had created any bias in the minds of the jurors. The judge declined to put these further questions to the jurors.

We agree with the judge's reasoning that the purpose of questioning prospective jurors is to determine whether they are free from interest, bias and prejudice, rather than to find out how they may have come to have an improper attitude. G.L. (Ter. Ed.) c. 234, § 28. The decision not to

ask the further questions requested by the defendants was within the sound discretion of the judge. *Commonwealth* v. *Geagan*, 339 Mass. 487, 502-508, *cert. den. sub nom. Geagan* v. *Massachusetts*, 361 U.S. 895. *Commonwealth* v. *Nassar*, 351 Mass. 37, 40-41. *Commonwealth* v. *Nassar*, 354 Mass. 249, 252-254. *Commonwealth* v. *Ricard*, 355 Mass. 509, 510-511. Although it would have been entirely proper to poll the jurors, *Commonwealth* v. *Crehan*, 345 Mass. 609, 615, the judge also might have been reluctant to call the attention of the jurors to possible sources of adverse publicity. *Taylor* v. *Creeley*, 257 Mass. 21, 26. Each of the jurors eventually selected stated that he had no opinion, bias, or prejudice with respect to the case or any of the defendants. The judge noted that he had "no reason to believe that any juror answered a question untruthfully." Cf. *Marshall* v. *United States*, 360 U.S. 310, 312-313.

Three other articles published during the trial were also the basis of various defence motions. During the Commonwealth's opening statement, Mr. Travers stated that "the Commonwealth will present evidence of a trip by Martin Hanley and one Jerome Troy to Washington" to pick up the "package from Barber." The following day, an article in the Boston Globe accurately quoted Attorney General Brooke as stating that "[t]here was no intention to implicate Judge Troy in the crime at all.... We don't propose that the judge knew the nature of the trip." The early edition of the Boston Globe on August 18, 1966, carried a page 1 headline, "Brooke Says Judge Troy in the Clear." A motion for a mistrial, and a motion to poll the jury concerning their knowledge of the publications were denied. The judge ruled that the defendants had failed to establish that they were prejudiced by the newspaper accounts.

Later in the trial, on September 10, 1966, The Saturday Evening Post published a long interview with Attorney General Brooke, then campaigning for the United States

Senate. The article included the following statements: "Brooke is honest and sincere, and in Massachusetts politics that *is* out of the ordinary.... He won the attorney generalship in 1962 ... and immediately began indicting Democrats. ... While some indictments have turned sour—conspiracy and bribery cases usually depend on one of the parties to a crime admitting that he is a crook, and sometimes the parties change their minds—there is no shortage of new ones.... Brooke, who had no primary opposition, campaigned against sin. In this case sin is alleged to infect some of the state's principal small-loan companies, whose officers are accused of conspiring with state officials to keep loan rates high." The judge denied a motion for a mistrial and a motion to poll the jury concerning the article, again ruling that "the publication and the distribution of the article in question will not deprive, nor reasonably could it deprive, the defendants of a trial before a jury whose verdict will be based solely on the evidence presented, or to be presentd in open court during the course of this trial."

Finally, on October 29, 1966, near the end of the first trial, an article in the Boston Herald reported that the "Consumer's Council," a government body (see St. 1963, c. 773), had recommended the abolition of the Rate Board "because of the past activities concerning bribery and the solicitation and acceptance of bribes and the manipulations of this Board by its members and by the industry which it regulates." The judge again denied motions for a mistrial and for a poll of the jury.

The denial of the motion to poll the jury concerning the articles was within the judge's discretion. *Taylor* v. *Creeley*, 257 Mass. 21, 26. The motions for a mistrial, on the basis of publiction alone, were also addressed to the judge's discretion. *Worcester Tel. & Gazette, Inc.* v. *Commonwealth*, 354 Mass. 578, 580-581. He determined that 2 of the articles

were not prejudicial to the defendants. The article concerning the recommendation of the Consumers' Council, although it gave the judge somewhat greater pause, was cast in fairly general terms and did not specifically relate to the proceedings before the court. Furthermore, before denying the motion for a mistrial based on this article, the judge instructed the jury as follows: "I repeat now what I have said to you on a number of occasions in the past, to the effect that ultimately, when you deliberate in your attempt to reach a verdict in this case, you must arrive at your decision solely on the basis of facts which may be agreed to by the parties and reported to you from time to time, plus the evidence which is presented during the course of the trial in open court and in your presence. Those are the limits of matters which you may consider as the basis for your verdict. I told you early in the trial, and I think I repeated later, that if you read or see or hear from any other source anything concerning this case or anything concerning the proceedings of the Court during your absence, you must total y disregard what you see or hear or learn in this manner, or from any such source, because it is not evidence and it is not to be considered by you in your ultimate decision of this case." Particularly in view of the judge's prompt, clear and forceful instruction, we cannot say that he abused his discretion in denying the motion for a mistrial. See *Commonwealth* v. *Eagan*, Mass. , .*

2. The judge also denied requests during the empanelling and again at the beginning of the trial that he instruct the jurors "not to read any newspaper accounts or listen [to] or watch radio or television reports concerning any of the proceedings in these cases." The defendants contend that his refusal to give these instructions constituted error. We do not agree.

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* Mass. Adv. Sh. (1970) 889, 891-892.

It is, as the defendants urge, the recommendation of the American Bar Association Advisory Committee on Fair Trial and Free Press, chaired by a member of this court, that instructions such as those requested be given "[i]n any case that appears likely to be of significant public interest." See Standards Relating to Fair Trial and Free Press, § 3.5 (e), pp. 139-140, 144-145, published after the trial of these cases. In this case, however, absent a showing of prejudice, we do not see that failure to give this salutary warning constituted error.

The question whether newspaper publicity has engendered prejudice to defendants is one in which the trial judge has large discretion. *Marshall* v. *United States*, 360 U.S. 310, 312. "Whether a judge has abused his discretionary powers is to be determined by the special facts of each case." *Commonwealth* v. *Eagan*, Mass. , [b] Our attention has not been called to alleged sources of prejudicial publicity other than those discussed above. This case involves no such massive publicity as was present in *Estes* v. *Texas*, 381 U.S. 532, or *Sheppard* v. *Maxwell*, 384 U.S. 333. The articles did not relate to matter ruled prejudicial by the judge, cf. *Marshall* v. *United States*, 360 U.S. 310, 311, or conceded by the prosecution to be prejudicial, cf. *Worcester Tel. & Gazette, Inc.* v. *Commonwealth*, 354 Mass. 578, 579-580, or to criminal convictions, inadmissible for important independent reasons. Cf. *Commonwealth* v. *Crehan*, 345 Mass. 609, 610-611, and G.L. c. 233, § 21, as amended through St. 1950, c. 426. The case last mentioned is further distinguishable upon the ground that here the judge's prompt, clear, and forceful instructions to the jury, quoted above, were hardly susceptible of misunderstanding by the jury. Cf. *Commonwealth* v. *Crehan*, *supra*, at 611-612, 614-615. The instructions given were, in the

[b] Mass. Adv. Sh. (1970) 889, 891.

circumstances, sufficiently *strong* to counteract the possible effect of the adverse publicity. See *Commonwealth* v. *Eagan*, Mass. , .[c]

3. Household, Barber, Pratt, Glynn and Farrell contend that it was error for the judge to submit 4 special questions to the jury, to wit: (1A.) Whether a bribe was given, (1B.) If yes, in what city and State. (2.) Whether a bribe was offered, and (3.) Whether a bribe was promised. In commenting to the jury upon these questions, the judge stated, "[A]s to each such count the Court is asking the jury to answer some special questions and then to give its verdict." The defendants contend that once the jury answered the special questions, the general verdicts constituted "hollow affirmations" of matters already decided, depriving the defendants of their rights to due process and fair trial. Their argument is that the jury's reliance upon special questions may undermine the generality of their verdict under G.L. c. 278, § 11, which provides as follows: "The jury . . . after having received the instructions of the court, shall decide, in their discretion, by a general verdict, both the fact and the law involved in the issue, or they may, at their election, find a special verdict."

It is well settled that in civil cases the trial judge has the power to submit special questions to be answered by the jury as supplementary to a general verdict. E.g., *Hill* v. *Hayes*, 199 Mass. 411, 417; Note, "Common-Law Power and Duty of Court to Submit Proper Special Interrogatories to Jury," 15 Anno. Cas. 469. The defendants urge that criminal cases be distinguished and place principal reliance on the case of *United States* v. *Spock*, 416 F. 2d 165, 180-183 (1st Cir.).

It may well be that with respect to the matter of special questions different considerations are operative in the 2

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[c] Mass. Adv. Sh. (1970) 889, 892.

classes of cases. See *Skidmore* v. *Baltimore & O. R.R.*, 167 F. 2d 54, 70 (2d Cir.), *cert. den.* 335 U.S. 816. We note, however, that even in a criminal case, the use of special questions may in certain circumstances serve as an aid to an appellate court (cf. *Stromberg* v. *California*, 283 U.S. 359, 367-368), or be otherwise helpful to the proof or disposition of the case. See authorities cited in *United States* v. *Spock*, 416 F. 2d 165, 182, at n. 41. We do not agree with the defendants' contention that the 4 questions here submitted were such as to lead "the jurors down the guilty trail." In any event, "[t]he answers were not inconsistent with and were superseded by the verdicts. If the answers be considered as incorporated in the verdicts and thereby a part of them, the validity of the verdicts is not affected." *Commonwea'th* v. *Bartholomew*, 326 Mass. 218, 221.

4. Pratt and Barber argue that it was error for the judge to refuse to poll the individual jurors after the return of their verdicts. The settled law of this Commonwealth is otherwise. *Commonwealth* v. *Goldenberg*, 338 Mass. 377, 386. See *Hernandez* v. *Delgrado*, 375 F. 2d 584, 585-586 (1st Cir.).

5. The defendants also assign as error various elements of the judge's charge to the jury. Pratt objects to the judge's failure to instruct that an agreement "to participate in the unlawful combination" is essential to a finding of guilt under the conspiracy indictments. Liberty and Woodcock were denied a requested instruction that the jury, in order to find them guilty, must find that Woodcock's words at the Commodore meeting were "coupled with a then present intent ... of joining, participating and actively assisting in an illegal venture." These requested instructions were adequately covered by the judge's charge which included, inter alia, the statement that "the Commonwealth must prove as to a particular defendant ... that he, by his own actions, words, or conduct entered into an agreement

with one or more other persons to commit a crime. Now, this is not the same thing as talking to somebody about somebody else's committing a crime." The judge was not obliged to adopt the exact wording of the instructions requested by the defendants. *Commonwealth* v. *Beal*, 314 Mass. 210, 231.

6. Household contends that the judge's instructions permitted the jury to find Household guilty of a conspiracy (a) with its own employees, or (b) between its own employees. See *Poller* v. *Columbia Bdcst. Sys. Inc.*, 284 F. 2d 599, 603 (D.C. Cir.), *revd. on other grounds* 368 U.S. 464, 469; *Pearson* v. *Youngstown Sheet & Tube Co.*, 332 F. 2d 439 (7th Cir.), *cert. den.* 379 U.S. 914. However, the charge as a whole sufficiently informed the jurors that in order to find Household guilty, they must first find that the individual employees, Pratt or Barber or both, had conspired with someone outside of the corporation. In any event, the guilty verdicts returned against the other defendants on the conspiracy indictments involving Household clearly show that Household was not being held to account merely for an intra-corporate agreement.

7. The judge denied Household's request for an instruction that if a gift, offer, or promise were made to Hanley with the sole intent that he pass it on to the members of the Rate Board, Household could not be found guilty of the bribery of Hanley under G.L. (Ter. Ed.) 268, § 7. In *Commonwealth* v. *Barker*, 311 Mass. 82, 84, 90, the defendant (in a companion case) in a prosecution for accepting a bribe insisted at trial that he had received the money only for the purpose of giving it to another municipal officer, and an instruction similar to that requested by Household was given. In the present case there was considerable evidence that at least part of the "program" was to go to Hanley himself. The judge, "[h]aving given the jury correct rules for their guidance . . . is not required to go

further and discuss possible findings of fact upon which a defendant might be acquitted. *Commonwealth* v. *Greenberg*, 339 Mass. 557, 585.

8. Household, Barber, and Pratt urge that there was no evidence on which the jury could find that the bribe was designed to influence Hanley's conduct in his official capacity (see G.L. c. 268, § 7), since his actions before the Rate Board were not authorized by statute, regulation or established usage. However, the jury could have found that the defendants believed Hanley was a key figure at the rate hearings, and that Hanley "used the real *or supposed* power of [his] office to obtain money for himself . . . in violation of his public duty, and that under color of his office he exercised *de facto* the power needed to accomplish what he set out to do" (emphasis supplied). *Commonwealth* v. *Avery*, 301 Mass. 605, 608. If, in such circumstances, the acceptance of a bribe is proscribed, as the *Avery* decision held, we perceive no reason why the same considerations of policy should not, under the statute, forbid the offer or promise of a bribe.

9. Household, Barber, and Pratt also claim error in the judge's charge to the jury that if Garfinkle was a member of the Rate Board, and if Hanley was Supervisor of Loan Agencies, then each was an "officer" within the meaning of the statute, as matter of law. The defendants argue that in giving this instruction the judge impermissibly invaded the fact-finding province of the jury and in effect, directed a verdict for the Commonwealth as to 1 element of the offence charged. This argument cannot prevail. It is true that whether the duties of a particular defendant are of a character to bring him within the ambit of a statute is a question which may properly be left to the jury. *Commonwealth* v. *Tsaffaras*, 250 Mass. 445, 448. *Commonwealth* v. *Dowe*, 315 Mass. 217, 225-226. But here the judge carefully and correctly instructed the jury that the burden was on the

Commonwealth to establish that the person allegedly bribed was an "officer." He did not direct a finding that Garfinkle and Hanley were "officers" under the statute. The charge was addressed, rather, to the meaning of the statutory term.

10. Liberty and Woodcock argue that the judge committed error in refusing to instruct the jury that the "absence of a prior inconsistent statement can itself be an inconsistent statement," for purposes of impeaching a witness's testimony. Their theory is that the jury should have been explicitly informed that they were "entitled to believe that Heath's trial testimony was newly fabricated" because of his earlier failure to mention any statement by Woodcock at the Commodore Hotel meeting. The omission of a single item, however, from Heath's earlier lengthy accounts of the meeting hardly warrants the inference that his testimony at trial was newly fabricated. The judge was not obliged to burden the minds of the jurors with every conceivably helpful technicality of the law of evidence. His charge accurately stated the law in this Commonwealth as to prior inconsistent statements.

11. Likewise the judge's instructions concerning adherence to the conspiracy by means of silent acquiescence, as challenged by Liberty and Woodcock, fairly stated the law in this Commonwealth. Acquiescence in a conspiracy need not be indicated by words. *Commonwealth* v. *Favulli*, 352 Mass. 95, 113. See *United States* v. *Palladino*, 203 F. Supp. 35, 37-38 (D. Mass.). See also *supra* p. 70 of this opinion.

12. The final objections to the charge, raised by Household and joined in by Pratt and Barber, relate to the establishment of the defendants' corrupt intent as an element of the crime of bribery. First, it is argued that the judge erred in refusing to charge that if one attempts through offering something of value only to secure something to which he believes he is legally entitled, then that belief should be considered as bearing on whether he had

a corrupt intent. There was some evidence that Household believed it was entitled to a continuation of the existing rate on small loans because of certain statutory language allegedly limiting the authority of the Rate Board. There was no evidence, however, that Household believed it had a legal right to pay Hanley to maintain the existing rate. Cases such as *Commonwealth* v. *Ballou*, 283 Mass. 304, 314, are therefore not on point. The judge correctly charged that belief in the legality of the rate was no defence if the jury should find that notwithstanding and apart from that belief the defendants did actually bribe a public officer. To hold otherwise would be to create a major and illogical exception to the substantive offence of bribery. Household's position was adequately reflected in the judge's charge that the jury could consider Household's belief (as to the rate change) as bearing on whether Household had a motive to bribe, and hence on whether Household did in fact offer a bribe.

Household also contends that it was error to charge that a "gift or gratuity" was something which the defendant "was not *legally obligated* or required to give or to pay," on the ground that this instruction "excluded from the jury's consideration whether the offer might have been made under *compulsion* in fact," i.e., involuntarily. Apart from the fact that there was no request for an instruction that the jury consider the voluntariness of the promises to pay Hanley and Garfinkle (see *Commonwealth* v. *Enwright*, 259 Mass. 152, 158-159), we feel it helpful to repeat what was said in *Commonwealth* v. *Polian*, 288 Mass. 494, 499, as applicable to many facets of these proceedings: "Charges would be endless as well as confusing if a judge could be compelled to call attention to every subsidiary fact and every possible inference.... It is for the judge to decide to what extent he will state the evidence and discuss the possible inferences of fact that may be drawn from it."

13. The defendants also raise various objections to the judge's handling of evidentiary matters. Glynn, Farrell and Hanley assert that the judge committed error in hearing the Commonwealth ex parte on its applications for issuance of process to out-of-State witnesses, under G.L. c. 233, §§ 13A-13D. In its requests for process, the prosecution represented that 1 prospective out-of-State witness was "necessary and material . . . by reason of the fact that he agreed with others to pay a sum of money to [bribe] Martin J. Hanley, an executive officer of the Commonwealth of Massachusetts," and that a number of other persons were necessary and material witnesses because of their "personal knowledge that a sum of money was delivered to another for the purpose of being given to Martin J. Hanley." The judge's certificate issued under c. 233, § 13B, stated only that the testimony of a witness was material because of "personal knowledge that a sum of money was delivered to another for the purpose of being paid to an executive officer of the Commonwealth of Massachusetts." None of the prospective out-of-State witnesses actually testified at the trial.

The defendants' contention is twofold: First, that the ex parte hearing prejudiced the judge against the defendants and deprived them of their right to a fair trial; and second, that it deprived them of their right of confrontation under the Sixth Amendment.

As to the first point, we note that the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, adopted in Massachusetts as G.L. c. 233, § 13A-13D, contemplates that the materiality of the testimony of a witness be shown in the certificate of the judge of the demanding State, or else in separate proceedings commenced upon that certificate in the requested State. See *People* v. *Cavanaugh,* 69 Cal. 2d 262; *Re Stamler,* 279 App. Div. (N. Y.) 908. Presumably, the judge of the

demanding State is to satisfy himself that the testimony is in fact material. A bare allegation of materiality, on the part of the prosecution, may not afford a sufficient basis for this determination. *State* v. *Fouquette,* 67 Nev. 505, *cert. den.* 341 U.S. 932. Contrary to the defendants' contention, the judge here made no preliminary "findings of conspiracy" on the basis of the prosecution's representations. He merely discharged his duty under the statute. To hold that the prosecution's representations so prejudiced the judge as to preclude a fair trial would render useless the statutory procedure of G.L. c. 233, §§ 13A-13D. Neither the judge's certificate nor the representations were ever seen by the jurors, who, of course, were the finders of fact.

As to the second point concerning the claimed denial of the Sixth Amendment right of confrontation, we are not certain what rights of cross-examination and of representation by counsel are claimed to have been lost. A proceeding to compel the attendance of a witness, even if it is an aid to a separate criminal proceeding, is not necessarily itself criminal in nature. *Epstein* v. *People of State of New York,* 157 So. 2d 705, 707 (D. Ct. App. Fla.), which held that a Florida proceeding under the Uniform Witness Act, based on the certificate of a New York judge, was not criminal and did not require an opportunity for cross-examination. Here, the worst that could happen as a result of the defendants' inability to cross-examine the prosecution during the requests for process was that a witness would be summoned who should not have been summoned. If such a witness testified against the defendants, he would be subject to cross-examination. We therefore find that the defendants were not deprived of any Sixth Amendment rights by the ex parte hearings on the prosecution's requests for process. Even if the Sixth Amendment did apply, the error, if any, would be harmless, as none of the out-of-State witnesses testified. Consequently the triers of fact were not

exposed to the prosecution's ex parte allegations. Cf. *Haller* v. *Robbins*, 409 F. 2d 857, 859 (1st Cir.), where a detrimental hearsay statement as to the conduct of the criminal defendant was made ex parte by a prosecutor to the sentencing judge.

14. Several defendants take exception to the judge's admission and exclusion of evidence. Beneficial argues that it was error to admit 2 statements read by Mr. Robert G. Miller at the Rate Board hearing. In the first statement Mr. Miller said that he was "an attorney ... [from the] State of New Jersey, representing the Beneficial Finance Companies which do business in Massachusetts," and that "we acknowledge the form of notice sent to us, telling us of this hearing." In the second, he requested that the hearings be terminated. It is contended that there was no evidence that Mr. Miller was an agent of Beneficial, and that therefore his statements were not admissible against Beneficial. Aside from the fact that the Massachusetts business trusts owned by Beneficial do business as Beneficial Finance Company, there was testimony by Heath that in 1960 and 1961 Mr. Miller had been present at various State House hearings relative to the small loans industry; that Mr. Miller attended the 1962 meeting at the Chatham Bars Inn to discuss changes in the form of the annual report, which was prepared by Beneficial; and that on November 8, 1962, the day before the meeting in the Commissioner's office to study procedures for the rate hearing, Mr. Miller shared a room with Glynn in the Parker House, where they were met by Heath. Robert S. Leadbetter, the assistant supervisor of small loans agencies, also testified that Mr. Miller represented Beneficial at the Rate Board hearings in 1962. Mr. Miller could have been found to be an agent of Beneficial.

15. Liberty and Woodcock contend that the judge erred in admitting against them certain evidence as to the con-

versations and acts of others. The constitutional issue raised by these contentions has been fully discussed in the treatment of defendants' motions for severance, *supra,* 29, and need not again be considered here.

These defendants concede that acts and statements of co-conspirators made during the course of and in furtherance of a conspiracy are admissible on a conspiracy indictment. E.g., *Commonwealth* v. *Kiernan,* 348 Mass. 29, 59. Nevertheless, they argue, first, that there was insufficient evidence to link them with Glynn, Pratt, Heath, Hanley and Garfinkle as co-conspirators. The findings and rulings of the judge, amply supported by the evidence, were otherwise.

Liberty and Woodcock next urge that particular conversations of others were improperly admitted against them because they were not in furtherance of the conspiracy allegedly agreed to by Woodcock. Although the argument appears to be highly technical it is but superficially so. We have reviewed the evidence as to the various conversations, and find that in each case the evidence was probative, in context, and that there was a proper basis for its admission. The same applies to the evidence of Hanley's trip to Washington. "[I]t is not necessary that every piece of evidence admitted should be sufficient by itself to prove the crime. Evidence which would be colorless if it stood alone may get a new complexion from other facts which are proved, and in turn may corroborate the conclusion which would be drawn from the other facts." *Commonwealth* v. *Mulrey,* 170 Mass. 103, 110-111.

16. Liberty and Woodcock also argue that certain evidence offered by them was improperly excluded. The transcript reveals the evidence in 1 instance was immaterial and in another was hearsay properly objected to. There was no error. A third objection relates to proposed extension of cross-examination. "[I]t is settled that how far the cross-examination of a witness may be deemed helpful

and relevant to the issues being tried, as well as to what extent the accuracy, veracity or credibility of the witness may be tested, must be left largely to the sound discretion of the trial judge, and is not open to revision, unless it is shown that such discretion has been exercised in a way that results in the prejudice of a party to the cause by reason of either too narrow restriction or too great breadth of inquiry. *Jennings* v. *Rooney,* 183 Mass. 577, 579, and cases cited. *Gerber* v. *New York Central Railroad,* 288 Mass. 318, 321." *Commonwealth* v. *Beal,* 314 Mass. 210, 229. We are of opinion that there was no abuse of discretion.

17. Hanley asserts that there was error in his joinder for trial with the other defendants. On this point, we refer to our discussion on the question of severance in the pre-trial portion of this opinion, *supra,* 52. No further elaboration is required.

18. Household contends that it was error for the judge to make a preliminary ruling that Hanley, who was not mentioned in Indictment 11910, could be found to have been a co-conspirator in the conspiracy to bribe Garfinkle charged in that indictment. The defendants Barber and Pratt have adopted Household's argument. At the time of the judge's ruling, during the third month of the trial, Household moved for a mistrial "on the ground that in effect the Indictment 11,910 was being amended by adding the name of Hanley as a co-conspirator." This motion was denied and Household duly excepted.

We agree with Household that the "offense must not only be proved as charged, but it must be charged as proved." *Commonwealth* v. *Ancillo,* 350 Mass. 427, 430. The judge's ruling as to Hanley, however, did not amount to a fatal variance between the offence charged and the one proved because the indictment included as conspirators "divers other persons . . . unknown" in addition to those named. It is true that if "the persons alleged to be unknown

to the grand jury were actually known to them . . . there is a variance betweeen the allegation and the proof which vitiates the indictment." *Commonwealth* v. *Galvin*, 310 Mass. 733, 735. *Commonwealth* v. *Thornton*, 14 Gray 41, 42. *Commonwealth* v. *Merrick*, 255 Mass. 510, 513. Household has failed to convince us, however, that the grand jury were aware of Hanley's activities in connection with the conspiracy to bribe Garfinkle to as great an extent as the judge was when he made his ruling. Apparently Heath's testimony before the grand jury did not include certain facts with respect to Hanley which were part of his testimony at the trial and crucial to the judge's ruling. The grand jury might well have been able to conclude that others not known to them were involved in conspiracies other than those with which he was charged. In these circumstances, Household has not rebutted the presumption that the assertion in an indictment that certain persons are unknown to the grand jury is a true statement. *Commonwealth* v. *Galvin*, 310 Mass. 733, 735. We need not decide whether in the circumstances of the case before us, even if a variance were shown, it was one which prejudiced Household's defence sufficiently to call for acquittal under G. L. (Ter. Ed.) c. 277, § 35.

19. Objection is made by Household, Beneficial, Glynn, Farrell, Liberty and Woodcock to the judge's selective removal as to certain defendants of limitations on 48 items of evidence. Barber and Pratt have adopted Household's argument. This issue arose in the following manner. Pursuant to motions of the Commonwealth, the judge made preliminary rulings during the trial that Barber, Pratt, Household, Farrell, Glynn, Beneficial, Woodcock, Liberty and Heath could have been found to have conspired to bribe Hanley as charged in Indictment 11900, and that the same persons or corporations plus Hanley could have been found to have conspired to bribe Garfinkle as charged in Indict-

ment 1.1910. Simultaneously with the granting of these motions, the judge lifted limitations on 48 items of evidence to the extent requested by the Commonwealth, without admitting this evidence against all of the conspirators. This evidence had originally been admitted against only 1 of their number. Several defendants duly excepted to these rulings. Shortly thereafter, the judge informed the jury of the changes in limitations by describing to them the portions of evidence in question and stating on which indictments, or counts, and against which additional defendants each portion could be considered. This procedure was also excepted to. Several defendants, in addition, filed motions at this time for severance, or in the alternative, for a mistrial, which were denied by the judge. Finally, Household requested the judge to instruct the jury that if they were uncertain as to what evidence might be considered against a defendant, they must return a verdict of not guilty against that defendant. Household excepted to the failure of the judge to so instruct the jury.

Two grounds are offered to support the proposition that this expansion of the prior limitations on evidence was improper. The first focuses on the sheer number of limitations. It is claimed by Household, Beneficial, Liberty and Woodcock that the jury could not possibly have followed the judge's complex and intricate recital involving numerous items of evidence and a constantly changing array of defendants and counts and indictments. In addition, Household claims the only instruction it requested could have insured a proper jury verdict.

The procedure followed here of initially admitting evidence subject to limitations and subsequently broadening these limitations and so informing the jury is well established in our law. *Commonwealth* v. *Benesch,* 290 Mass. 125, 132-133. *Commonwealth* v. *Stasiun,* 349 Mass. 38, 50.

Commonwealth v. *French*, Mass. , .[d] Its use was not made improper by the fact that this case was large and complex. This was a feature of the case which the judge had to deal with as best he could; we can think of no simpler way he could have informed the jury of the necessarily complex pattern of suspensions of prior limitations on evidence than the 1 he chose.

Nor was the instruction requested by Household necessary to insure that a guilty verdict rested only on evidence which it was proper for the jury to consider. In his instructions the judge cautioned the jury at length that they must recall and apply all limitations on all the evidence, giving effect to the changes made during the trial by him. Implicit in these instructions was the admonition that if the jury could not remember the limitations on a given item of evidence they could not consider it. In fact, it is highly improbable that the jury could or did remember all the limitations on all the evidence, but to return a guilty verdict against a defendant it was necessary that they remember only the limitations on that part of the evidence which was critical to sustain a conviction against that defendant. These were emphasized by counsel for the defendants in their final arguments. There is no indication that the jury could not or did not comprehend the limitations. "We see no reason to depart from our rule that jurors are expected to follow instructions to disregard matters withdrawn from their consideration." *Commonwealth* v. *Eagan*, Mass. , ,[e] and cases cited. See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485. The instruction requested by Household would have required the jury to perform an exceedingly difficult, if not impossible, task which was not necessary to the

[d] Mass. Adv. Sh. (1970) 619, 637-638.
[e] Mass. Adv. Sh. (1970) 889, 892.

return of a verdict against a defendant based only on evidence admissible as to him or it.

The second ground for objection, raised by Beneficial, Glynn, Farrell, Liberty and Woodcock, is that, apart from their number, limitations were improperly expanded in 2 respects. First it is alleged that it was improper, under *Commonwealth* v. *Benesch*, 290 Mass. 125, 132, to admit evidence against some who could have been found to be co-conspirators but not all. There is nothing in the *Benesch* case, however, which requires that after a preliminary ruling of conspiracy, evidence originally admitted against 1 conspirator must be admitted against every other conspirator or not broadened at all. The defendants cannot complain that less evidence was broadened to apply to them than might properly have been. Nor have they introduced any indication that the selective broadening of evidence was intended to, or in fact resulted in, putting them in a worse position than other defendants who were subject to this procedure. In these circumstances we cannot say that the rule applied in the *Benesch* case precludes application of a rule allowing selective expansion as was here adopted by the judge. See *Commonwealth* v. *Kiernan*, 348 Mass. 29, 56-58.

The defendants also argue that the judge's alleged departure from the rule in the *Benesch* case impinges upon their Federal constitutional rights. Farrell and Glynn contend that "the substitution by the court of the arbitrary discretion of the prosecutor for the long-settled rule stated in *Commonwealth* v. *Benesch* deprived the defendants of a fair trial in violation of the Due Process Clause." The thrust of their contention is that the judge, in ruling on the defendants' motions to strike, abandoned his judicial responsibility to the prosecutor by allowing the prosecutor and the defendants to reach "mutual agreements" as to which evidence, theretofore admitted against a particular

defendant, should be struck.[67] The defendant Glynn, in particular, relies on the ruling of the judge that "in the absence of any such agreement this court will rule on the motions to strike on the basis of what it understands to be the rules of evidence relating to a trial of this kind." In his oral argument, Glynn's counsel referred to the above language as "shockingly cynical."

To the contrary, we deem the above ruling of the judge to be a clear exposition of the fact that he would exercise his judicial responsibility in applying the rules of evidence. The judge made this clear when he specifically ruled that "[t]his Court does not feel that it is bound or limited by the Commonwealth's statement of intent or of its 'rule of fairness'; and it does not consider anything which has occurred to this point as establishing a 'law of the case' requiring the striking of any evidence which is otherwise properly in the case." An examination of the transcript and the judge's rulings supports the foregoing disclaimer

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[67] In support of this contention, the defendants rely on the judge's ruling in the second trial where he stated: "Wherever the Commonwealth has specifically limited evidence which it offered, this Court has not attempted to enlarge the scope of application as thus limited. That has been true whether the limitation was stated when evidence was originally offered, or was stated when the Commonwealth sought to enlarge the applicability of evidence. This Court has in some instances denied, but never enlarged the scope of application requested by the Commonwealth. We are not faced with the question of what this Court should do with evidence which it has heretofore ruled to be admissible as to a particular Defendant, either when originally offered or when limitations were enlarged, and which the Defendant now seeks to strike on the basis of the so-called 'rule of fairness,' and over the objections of the Commonwealth. This Court does not feel that it is bound or limited by the Commonwealth's statement of intent or of its 'rule of fairness'; and it does not consider anything which has occurred to this point as establishing a 'law of the case' requiring the striking of any evidence which is otherwise properly in the case. This Court will consider mutual agreements, if any, for the striking of evidence heretofore admitted as to any particular Defendant. However, in the absence of any such agreement, this Court will rule on the Motions to Strike on the basis of what it understands to be the rules of evidence relating to a trial of this kind."

of judicial abdication to the prosecutor and reveals that the judge in actuality was extremely circumspect in admitting various items of evidence against the respective defendants and thereby minimized any possible prejudice.

Thus, Glynn's argument is reduced to the patently specious assertion that he was deprived of a fair trial because the prosecution did not offer and the judge did not admit all of the evidence against all of the defendants. It is beyond our comprehension how Glynn can claim prejudice from the fact that evidence which could only be damaging to his defence was not admitted against him. Indeed, it is apparent that the judge showed the greatest possible deference in protecting the defendants' rights by striking a balance between any conceivable harsh effect of admitting all of the evidence against all of the conspirators, regardless of the scope of their involvement in the conspiracy, and the totally impractical alternative of having 8 separate trials.

Glynn and Farrell further claim that certain other expansions of the evidence were improper because the portions in question were originally admitted against Hanley and Garfinkle, "who . . . [were] not connected by finding or ruling with" the counts and indictments as to which the portions of evidence were expanded. The fact that these expansions were not based on the preliminary rulings of conspiracy does not, however, mean they were improper. As we have previously noted, the indictments in the first grouping were converse indictments, some charging those who gave the 1962 bribes and others charging those who accepted them. The same evidence, therefore, seen in the light of other evidence later admitted, might well have been relevant and proper in connection with both types of indictments, although it was only originally admitted in connection with 1.

With respect to the foregoing point, Beneficial also makes, apparently *for the first time,* the very peremptory

argument that this procedure denied it the opportunity of cross-examination and therefore violated its right of confrontation. The Commonwealth asserts that the defendants failed to save adequate exceptions on this point and that it cannot now be considered by us. *Commonwealth* v. *Myers*, 356 Mass. 343, 346. *Commonwealth* v. *Foley*, Mass. ,

[1] It is unclear whether the basis for this argument was adequately identified and exceptions saved. In any event, the transparent sophistry of this argument is illustrated by the fact that the defendants were well aware during the course of the trial that the judge could have admitted all of the evidence against all of them. Therefore their opportunity to cross-examine was in no way undermined by the fact that the judge chose not to admit certain evidence against certain defendants. Moreover, it was within the power of the defendants to request that witnesses be subject to recall. There was no error.

20. All of the defendants have appealed from the denial of their motions for a new trial. These motions were filed after the start of the second trial and were based on material made available to them by the prosecution during that trial. The defendants contend that portions of this material were relevant to their defence in the first trial and that it should have been made available to them at that time, since this material was then in possession of the prosecution. The judge held a hearing for 3 days on the various allegations contained in the several motions, and disposed of them together in a comprehensive decision.

The objections of the defendants fall into 3 different categories. We deal with each one separately, designating for each the defendants who rely on it and the rulings of the judge relating thereto.

Household's objection is directed at the expense vouchers (see pp. 67-70) of the witness Heath for each week from the

[1] Mass. Adv. Sh. (1970) 1363, 1365.

week ending September 8, 1962, through the one ending October 20, 1962. The defendants Barber, Pratt, Liberty and Woodcock have adopted Household's argument relating to these vouchers. It is contended by Household that the vouchers would have been valuable in impeaching part of Heath's testimony. Heath testified extensively about a luncheon meeting he had with Glynn and Pratt in Boston at Purcell's restaurant, "within a week or one or two days prior to October 17 [, 1962]." During this meeting the possibility of bribery in connection with the 1962 Rate Board hearings was first discussed.[68] The vouchers, however, cover every business day on which Heath was in Boston during this period and include an entry for every lunch time showing that Heath was entertaining guests other than Pratt and Glynn. Since the judge's instructions permitted the jury to find Household guilty if they found Pratt guilty, Household claims that the vouchers were sufficiently important to its defence that their nondisclosure by the prosecution calls for a new trial, regardless of the good or bad motives of the prosecution in not disclosing them.

The judge, in rejecting this argument, noted first that the vouchers were not as significant as the defendants claim. "The expense vouchers were not complete records of Heath's daily activities, but only records of expenditures for which he sought reimbursement from his employer. . . . [T]he absence of any entry for a luncheon at Purcell's Restaurant, or for any similar occasion or meeting, is not evidence that such luncheon or meeting did not occur. It may be evidence that Heath incurred no reimbursable expense for such a meeting, but it does not prove that the meeting did not take place." Among the judge's other findings relevant to this issue are the following: (1) "The

[68] In view of our disposition of the objection raised, we need not deal with the issue whether the defendants Liberty and Woodcock have standing to raise it. The testimony of Heath regarding the Purcell's meeting was not admitted against these defendants.

total volume of records, documents and material turned over to the Attorney General by the Commission amounted to the equivalent of the contents of about twenty-four (24) ordinary file drawers," not all of it germane to the indictments in the first grouping. (2) "Prior to and during the trial, the Prosecutor caused copies to be made of a large volume of records, documents and material in his possession and which he thought might relate to the indictments on trial; he seasonably furnished the defendants with such copies.... In this connection the Prosecutor or persons acting for and under him made a reasonable and diligent search and examination of all the material in the Commonwealth's possession. The Commonwealth seasonably delivered to the defendants either the originals or copies of all the material in its possession which the Prosecutor thought related to the indictments on trial and which he thought the defendants were entitled to receive." (3) "[The disclosure by the Commonwealth] was probably the most full and complete disclosure ever made in the trial of a criminal case in this Court." On these facts the judge concluded that "[t]he Commonwealth acted with full and complete reasonableness, diligence, and good faith in considering and deciding what material it was required to make available to the defendants in connection with said trial... [and] did not consciously, knowingly, intentionally, or otherwise suppress or withhold from the defendants any material which the defendants were entitled to see or receive in connection with said trial."

The judge's findings are supported by the evidence and his conclusions are not inconsistent with the Federal Constitutional principle that "the suppression by the prosecution of evidence favorable to an accused... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U.S. 83, 87. The

Supreme Court of the United States has to date refused to decide "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial." *Giles* v. *Maryland*, 386 U.S. 66, 74. The *Giles* case, in fact, the court's most recent decision on the prosecution's duty to disclose, was decided by a 5 to 4 court and failed to produce even a majority opinion, despite the Court's avoidance of the broad questions presented to it. In this unsettled state of the law, we conclude that the prosecutor's duty to disclose must be measured by the directness of the materiality of the item of evidence in question to the defence taken together with the sheer volume of all the evidence in the hands of the prosecution. It is clear that the greater the body of evidence, the less feasible it is for the prosecutor to weigh each item deliberately and at length for its possible usefulness to the defendant in response to a general request by the defendant for disclosure of whatever the prosecution might have that might be useful. In such circumstances, the Federal Constitution does not require a new trial on the ground that the prosecutor's decision with respect to a marginally useful item of evidence was not what it might have been under ideal conditions. We can only expect and require under the due process clause "essential fairness of ... procedure" (*Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842, 846 [4th Cir.]) and good faith, not perfection.

The significance of the vouchers to the defence here, and the volume of evidence which the prosecution possessed in this case, are both sufficiently distinct from the comparable facts in the Supreme Court of the United States cases from 1935 requiring disclosure, to warrant a different result. The crimes involved in those cases were less complex (e.g. murder and rape-murder) and the evidence considerably less voluminous. Furthermore, in those cases the cardinal

importance of the undisclosed facts to the defence was clear; in some the prosecution had acted questionably or in outright bad faith in concealing them. *Brady* v. *Maryland*, 373 U.S. 83. *Miller* v. *Pate*, 386 U.S. 1. *Mooney* v. *Holohan*, 294 U.S. 103. *Alcorta* v. *Texas*, 355 U.S. 28. *Napue* v. *Illinois*, 360 U.S. 264. See *Giles* v. *Maryland*, 386 U.S. 66.

Household stresses Mr. Travers's testimony that he made "a conscious, intentional decision not to produce this evidence" and that the vouchers were not therefore overlooked by the prosecution in deciding what to disclose. Household does not charge misconduct on the part of the prosecution in deciding not to produce the vouchers, but contends rather "that Mr. Travers improperly allocated to himself the functions of the court in determining their producibility and the functions of defense counsel in determining their usefulness." However, this argument ignores the fact that Mr. Travers had 24 file drawers full of materials relating to the indictments returned in February and May, 1964. It was necessary for him, therefore, to decide with respect to all the evidence he had whether he should make any given item available to the defendants, and this decision, of necessity, had to be based on the relevance and possible usefulness of the evidence to the defendants. Far from usurping a function which was not his, Mr. Travers was simply performing a necessary preliminary step to disclosure. Even Household does not suggest that he should automatically have handed over all 24 file drawers. Nor do we feel, even in the light of hindsight, that the vouchers would have been of sufficient importance to Household in its defence as to require a new trial because Mr. Travers exercised his judgment in the way he did.

The Defendants Glynn and Farrell, in an argument adopted by Beneficial and Hanley, claim that Heath's vouchers for the period from June 1, 1962 to September 30,

1962, should have been made available to them. In an argument similar to Household's, they claim that the vouchers, covering every business day during the summer of 1962, would have been useful in impeaching Heath's testimony that 3 incriminating meetings involving himself, Glynn, and Hanley took place during that summer. Unlike Household, Glynn and Farrell allege in addition that the prosecution knowingly and in bad faith suppressed this evidence, pursuant to a "deal" with Heath that the vouchers would not be used at any trial. The judge found that no such deal was made and this finding was not clearly erroneous. Their argument thus stands on the same footing as Household's. We reject it for the same reasons that we rejected Household's, weighing on the 1 hand the less than crucial importance of the vouchers, discussed at some length by the judge, and on the other the quantity of evidence in the hands of the prosecution.

Liberty and Woodcock object to the nondisclosure of 2 portions of Heath's grand jury testimony which it is alleged "would have materially affected his credibility" and to an alleged misrepresentation by the Commonwealth of "the consequences of cross-examining Heath on a portion of his grand jury testimony supplied only to these defendants." The first portion of Heath's grand jury testimony which it is alleged should have been produced at the first trial is his testimony on December 17, 1965, the last day Heath appeared before a grand jury before the start of the first trial, 7 months later. It is alleged that this testimony was significant because "[i]n that testimony . . . [Heath] did not even name Woodcock as being among those present at the all-important Commodore [Hotel] meeting, much less have him say anything." It should be remembered, however, that Heath testified at great length and over a considerable period of time beginning in January, 1964. The judge found that "[n]either the defendants nor this Court

can expect that on every date and on every page of the transcript of every statement made by the witness Heath, or by any other witness, the witness will give and repeat the aggregate of all of his testimony on any particular issue, event, occurrence, or case." At other times before the special grand jury which returned these indictments Heath specifically placed Woodcock at the meeting. In addition, it was brought out on cross-examination of Heath at the trial that about 3 years before he had not been sure whether Woodcock was present at the meeting. Thus, this evidence would have added little, if anything, to that which was already before the trial jury tending to cast doubt on the reliability of Heath's memory. Plainly, at any rate, this evidence was not material.

The second portion of Heath's grand jury testimony which it is alleged was material to Liberty's and Woodcock's defence was a statement by Heath that he felt that Woodcock was trying to blackmail him in 1957. Liberty and Woodcock claim that this statement could have been used by them to impeach Heath's testimony at the trial that the defendants were his friends and that in particular he was "on cordial terms with all of the [Liberty] personnel in my area." However, the judge noted, "[Heath] did not claim or testify that all the defendants were his friends at the time he was testifying. If they were no longer friends at the time of trial, the reason is understandable. Neither did he specify when they *were* all his friends. Indeed, an examination of the entire transcript of his testimony at this trial indicates that he had worked with Woodcock for the same employer for a number of years before Woodcock left to go with Liberty, and that they were good friends 'over a period of years.' That is not inconsistent with Heath's Grand Jury testimony about the 'blackmail' conversation with Woodcock. Further, between the date of that conversation and the time of trial in this

case, nine years had elapsed, and there was much evidence of friendship between Heath and Woodcock during the intervening period." With respect to Heath's remark about the Liberty personnel in his area, the judge noted, "Woodcock was Liberty's Executive Vice-President at Liberty's home office in Missouri, and was not at any time part of the Liberty personnel in Heath's area." Therefore, to the extent this evidence could in fact have been used to impeach Heath on a matter which was not crucial to the indictments on trial, it would have been of only minor importance.

Finally, Liberty and Woodcock allege that the prosecution improperly deterred defence counsel from cross-examining Heath with respect to his grand jury testimony that at the Commodore Hotel meeting Woodcock refused to pay any money to Hanley. This portion of Heath's grand jury testimony was made available in the first trial to Liberty and Woodcock only. The defendants did not bring up this exculpatory prior testimony on cross-examination of Heath, however, because they were warned by the Commonwealth that if they did "it would result in the introduction of evidence of another crime." Thinking that the other criminality referred to was that with which Liberty and Woodcock were charged in indictment 11908, yet to be tried, counsel decided not to inquire further. At the second trial, during which Heath's grand jury testimony with respect to indictment 11908 was first made available, it developed that Woodcock had made no statements incriminating him in connection with that indictment at the Commodore Hotel meeting. The criminality of the prosecution was referring, according to Mr. Travers's testimony on the defendants' motions for a new trial, was a third conspiracy, called the "legislative program," for which some defendants but not Liberty and Woodcock were indicted.

The defendants allege that the prosecution's statement was a conscious misrepresentation requiring a new trial.

We disagree. As the judge noted, the statement of the prosecution was "perfectly correct, proper, and truthful," as it stood. The prosecution is not responsible for whatever interpretation may be made by defense counsel. We agree also with the judge that "[t]hese defendants were represented by able and experienced counsel who were free to weigh the statement and make their own decisions thereon, and they did so. They were free to continue cross-examination or not, as they saw fit. If they decided not to cross-examine further on any point, it was not because of any misrepresentation by the Commonwealth. It is not necessary for the Court or anyone else to indulge in the idle luxury of hindsight and thereby speculate whether the decision of counsel on matters of trial strategy was correct or not."

21. The final issue we treat with in the first trial relates to the sufficiency of the evidence to allow the substantive indictments (offering bribes to Hanley and Garfinkle) to go to the jury. Pratt, Barber, Woodcock, Liberty, Beneficial and Household raised this point through motions for directed verdicts. Beneficial raises this question on appeal in conjunction with its argument as to the sufficiency of the evidence on the conspiracy indictment. Household raises it in connection with its attack on the judge's charge. Barber, Pratt and Household also challenge the admission of certain evidence admitted against it under the substantive indictment.

It is true, of course, that proof of a conspiracy, without more, does not justify a finding that a conspirator has committed the offence which is the object of the conspiracy. *Commonwealth* v. *Stasium*, 349 Mass. 38, 47. We assume it is also established that to convict a defendant as a principal his scope of activity must surpass that of mere acquiescence and reach that of active participa-

tion. Cf. *Commonwealth* v. *French*, Mass. - -,[g] (conviction of a conspirator as an accessory before the fact upheld), and cases cited.

The evidence we have previously recounted with respect to each of the corporate and individual defendants demonstrates that each of them actively participated in the offer to bribe Hanley and Garfinkle. Without reviewing this evidence again, suffice it to say that it shows that the defendants specifically delegated to one of the co-conspirators, namely Barber, the authority to offer a bribe to Hanley. One may be convicted as a principal where he delegates to an agent the authority to do the act. See *Commonwealth* v. *Dolan*, 304 Mass. 325, 339. We have previously discussed at length the question of an agent's authority to bind his corporation. We do not repeat it here. The judge properly admitted evidence of statements by Farrell, Glynn and Heath against Barber, Pratt and Household. There was no error in the denial of the defendants' motions for directed verdicts.

PART III.

The Second Trial

A. *THE EVIDENCE*

In the opening statement of this opinion we explained that the evidence in the first trial centered around 1 particular event — the payment of bribe money to "fix" the 1962 rate hearings, whereas the evidence in the second trial covers a 7 year period during which Hanley was continuously paid money to bestow various favors upon the small loans companies.

Stated in its aspect most favorable to the Commonwealth,[69] this evidence is summarized as follows:[70] During

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[g] Mass. Adv. Sh. (1970) 619, 649-650.

[69] A diligent examination of the transcript reveals that many of the facts set out in the Commonwealth's brief are accurately stated and therefore we have adopted portions therefrom.

[70] The same method for designating limitations on evidence and subsequent admissions as was used in reciting the facts in the first

the period covered by these indictments (1957-1963) different statutory limitations were imposed upon the making of "small loans." Before 1956, the law required that any person engaging in the business of making loans of $300 or less had first to obtain a license from the Commissioner of Banks. G.L. c. 140, § 96 (as amended through St. 1941, c. 158, § 1). In 1956 this statute was amended to apply to loans of $1,500 or less, and as we have seen, the limitation was extended to cover loans of $3,000 or less in 1962.

The Commissioner of Banks also had the power to establish regulations governing the granting of "small loans" licenses and the business conducted by the licensees. Licenses are granted for a 1 year period and at least once during the year the affairs of the licensees must be investigated. G.L. c. 140, § 97. All licensees must make a return to the Commissioner showing a trial balance of the books of the licensee "with such other information as may be called for by the commissioner in accordance with a blank form to be furnished by him." G.L. c. 140, § 98. In order to assist him in carrying out these statutory functions, the Commissioner of Banks also has the power to appoint a deputy as supervisor of loan agencies. Hanley was appointed supervisor of loan agencies in February, 1950, and remained in this position at all times material to this case.

On October 1, 1953, comprehensive regulations governing the small loans business became effective. These regulations established a license fee of $200 and specified the form of license application. The regulations state that "[t]he total amount to be paid on any loans for interest and expenses shall not, in the aggregate, exceed an amount equivalent to 2% a month for a period terminating not

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trial is used here. The following symbols refer to the defendants in this trial: H = Household; B = Beneficial; L = Local; G = Glynn; F = Farrell; N = Newhall; P = Pratt; Br = Barber; Hly = Hanley.

later than one year after maturity, and to 6% per annum after the termination of said year, on the amount actually received by the borrower, computed on the unpaid balance."

The regulations vest substantial powers in the office of the supervisor to superintend the small loans industry. They provide that "[n]o change in the location of a licensed business shall take place without the prior written approval of the supervisor," and require that notice of changes of office managers be filed with the supervisor. In addition "[a]ll forms used in connection with the making and recording of loans . . . must have the prior approval of the supervisor." On or before November 1 of each year licensees are required to file an annual report "on a form furnished by the supervisor." Advertising material of the licensees was also regulated and ordinarily decided upon by the supervisor. In 1960, these regulations were amended. The amendments followed a number of meetings and public hearings held during the year 1960, and were preceded by temporary revisions.[71]

The division of loan agencies, of which Hanley was the supervisor, also had as its general responsibility the examination of licensees, the enforcement of consumer credit laws and regulations, and the general protection of the borrowing public. Within the division, the supervisor decided whether an applicant would be licensed and approval by the Commissioner of this decision was generally routine. The examinations of licensees by the division were conducted once a year by 26 examiners. An examiner was required to visit each of the licensed loan offices to check for overcharges or any violations of the law or the regulations.

During the years involved in these indictments there

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[71] H, L, B, G. This limitation applies only to material in the sentence footnoted.

were approximately 325 licensed lending offices in the Commonwealth. About 70% of these offices were so called "chain offices" — offices controlled by the same individual or company. The principal chain companies were Beneficial, Household and Public, which were known as "The Big 3," plus Seaboard Finance, Liberty Loan, and Local Finance Corporation. "The Big 3" had approximately 138 offices, of which Beneficial had 58 and Household and Public about 40 each.

At this point, we believe it helpful to identify the individual and corporate defendants as well as other companies and persons involved in the second trial.

During the period in question, Farrell, Glynn and Newhall were employed by Beneficial Management — the wholly owned subsidiary of Beneficial.[72] Farrell was a vice-president and director of Beneficial Management and head of the company's "public relations department."[73] In December, 1956, the defendant Newhall became regional director for public relations of Beneficial Management. His region included Massachusetts. He continued in these duties until the early part of 1958.[74] At that time, he was replaced as regional director for public relations in the Massachusetts region by the defendant Glynn, who was actually appointed in February, 1957.[75]

From 1957 through September of 1962, one Marlin E. Lerch was eastern director of public relations for Household.[76] In September or October of 1962, the defendant Barber replaced Lerch. Prior to that time Barber had been a regional director of public relations with respons-

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[72] Evidence concerning Beneficial Management's affiliation with Beneficial we described at length in the first trial opinion and we do not repeat it here.

[73] B

[74] N

[75] G

[76] Lerch was indicted but not tried.

ibility for Washington, D.C., Pennsylvania and Maryland.[77] From 1957 through December, 1958, Warren Engle did public relations work in Massachusetts for Household.[78] In September or October of 1959 Pratt became Household's public relations representative with responsibility for the 6 New England States. He remained in this position until approximately October of 1963. In 1962, Barber succeeded Lerch as Pratt's superior.[79]

Local owned, during the years 1957 through 1963, approximately 14 subsidiaries which were licensed to engage in the consumer loan business in the Commonwealth. From 1957 through 1962, one John McHenry, Sr., was the president of Local and the man who "ran the corporation."[80] He was in charge of its business and was responsible for public relations and trade associations. It was also his responsibility to deal with public officials. During the early part of this period one Michael E. Sands was assistant treasurer and chief auditor of Local.[81]

American Investment Company of Illinois, a holding company, operated a number of subsidiaries which were Massachusetts small loans licensees doing business under the name of Public Finance Company. Heath, who was 1 of the Commonwealth's principal witnesses, became an executive supervisor of the Boston division of American in 1949. In 1952 he became a vice-president. Heath held these positions until January, 1958. From about 1953, Heath had also been performing public relations in Massachusetts which included maintaining contact with Massachusetts supervisory officials. On January 8, 1958, Heath became regional director of industry relations for American. His duties in this position covered all of the New

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[77] Br
[78] H
[79] P
[80] McHenry died before the start of the trial.
[81] L

England States except Vermont. His immediate supervisor was one J. Miller Redfield, a vice-president of American, who was in charge of the industry relations department. Heath's duties involved maintaining good relations with members of the industry representing other companies, as well as dealing with legislative and supervisory officials. In connection with these duties Heath met with Hanley about 3 times a week, both socially and on business.[82]

Another important witness for the Commonwealth was one Louis Schwartz. Schwartz was president and trustee of Community Finance Company (Community) during the years here involved. Community was a Massachusetts trust that wholly owned a subsidiary corporation, Coleman Finance Company (Coleman). Coleman held 3 Massachusetts small loans licenses during the years 1957 through the fall of 1963. Schwartz made the policies of Coleman at all times material to this case.

Other individuals involved in the evidence in this trial are Woodcock of Liberty and one Calvert Bean, a high executive of Preferred Finance and State Loan and Finance Corporation.

In 1957, the Rate Board held rate hearings.[83] These hearings were held in the fall.[84] In December of 1956, or January, 1957, Schwartz was appointed chairman of a special committee of the Massachusetts Consumer Finance Association, an industry trade association, which was gathering statistics for the forthcoming rate hearing. The purpose of the committee was to contact all licensed companies, to advise them of the statistics which the committee was collecting, to present the licensed companies with forms to put the statistics on, and to send that in-

[82] Hly
[83] H, B, L, N, G
[84] L, N, Hly

formation to Haskins and Sells, certified public accountants.[85]

Beneficial was a member of the Massachusetts Consumer Finance Association from 1957 through 1960. Newhall represented Beneficial on the Executive Committee of this Association from 1957 through early 1958, at which time he was replaced by Glynn.[86] Household was a member of the association during 1957 and part of 1958. Household was represented on the executive committee by Lerch and Engle. Lerch was Engle's supervisor.[87] Local was represented on the executive committee of the Association by McHenry, its president, and was a member from 1957 through 1961.[88] Other members included Merchants Acceptance Corporation (MAC) represented by one Charles McDermott, Jr., its president.

Schwartz testified that he saw Hanley 3 times concerning the work of this special committee. On 1 of these occasions, about June 15, 1957, Schwartz ate lunch with Hanley and Heath at the Parker House in Boston. At the beginning of this lunch, the 3 of them were discussing rates in general when Hanley said to Heath: "Unless they dig up $50,000 before the Regulatory Hearing — They'd better dig up $50,000 before the Regulatory Hearing, or else." Hanley then said "that he could present a convincing case for a rate of 1.59 percent per month." Schwartz said that "this was an impossible rate and that . . . [he] would liquidate if we had such a rate." Heath said to Hanley: "You're crazy. They can never raise that kind of cash." Hanley responded: "Well, I might be willing to take $25,000 a year, spread over instalments for two years."[89]

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[85] H, B, L, N, G
[86] B
[87] H
[88] L
[89] Hly (B, N, G, L)

In his testimony Heath corroborated this incident. He testified that Hanley "pointed out what an important role he would play in the fixing of any rate by the Rate Board. He pointed out the statistics in his office would show that a small independent company . . . had shown conclusively over the years that they could operate at a rate of 1-1/2 per cent per month." Hanley also stated that "one of the largest finance companies in the nation had been successfully operating over a period of years above the licensed small loan limit at a rate of 1-1/2% a month." Hanley further said "it would not be too difficult to prove to the Rate Board that if one company could do it, the other companies could do it." Replying to Hanley, Heath said, "I am not a statistician, but I doubt very much if my company can successfully operate in the State of Massachusetts at a rate of 1-1/2% per month." Heath related that Schwartz told Hanley that "even if the big chains could operate at a figure of 1-1/2% a month, it would be the death knell of the small independent operator such as he, and he would in substance have to go out of business." Heath testified that Hanley then responded to Schwartz, that "upon payment of the sum of $50,000, he felt that the Rate Board would bring out a rate that would be easy to live with for the industry." Heath and Schwartz then declared that the industry could not "raise that kind of money," and Hanley indicated he might accept $25,000 over 2 years.[90]

Shortly after this luncheon meeting, Heath reported it to his superior, Redfield,[91] American's vice-president, and the man in charge of its industry relations department.

Schwartz testified that a day or 2 after the meeting with Heath and Hanley, he received a telephone call from Newhall[92] who was then Beneficial's Regional Director for

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[90] L, N, Hly (B, G)
[91] N (B, G)
[92] N (B, G)

Public Relations.[93] Newhall asked Schwartz to come to Newark, New Jersey, the following day to attend a meeting concerning the gathering of statistics for the Rate Board hearings. Schwartz said that he would be there.[94]

The following morning Schwartz flew from Boston to Newark. He took a cab to the offices of Haskins & Sells, and went to the room where the conference was being held. He entered and found about 20 people in the room, sitting around a conference table. As Schwartz entered the room, Newhall said, "Mr. Schwartz of the Coleman Finance, Boston," and pointed to an empty seat. About an hour after Schwartz arrived Newhall stood up and said to Schwartz, "I understand you had luncheon with Mr. Hanley yesterday." Schwartz said, "Yes." Newhall asked, "[d]id he say anything about a rate?" Schwartz said, "Yes." Newhall asked, "[w]hat was it?" Schwartz told Newhall that "Mr. Hanley had suggested a rate of 1.59, and I wasn't sure whether it was 1.59 or 1.69 percent per month."[95]

Later that afternoon, after having had lunch in the same building in which the conference took place, Newhall approached Schwartz and said, "Louis, stay behind for a few minutes. We're going to have a private meeting of some of the men who come to Boston." Schwartz said, "Okay." Newhall then left the room leaving Schwartz alone. A few minutes later Newhall returned with Lerch of Household, Redfield of American and a representative of Family Finance Corporation (Family). Lerch and Redfield had not been present at the original meeting, but had been present at lunch. Newhall approached Schwartz and said, "Louis, I understand that Mr. Hanley, in addition to mentioning the rate, said that he was looking for $50,000

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[93] N

[94] N (B, G)

[95] N

and would take it in two instalments of $25,000 each, spread over two years." Schwartz said, "[t]hat's right." Newhall, Lerch, Redfield and the man from Family then went to the other side of the room, where they had an animated discussion lasting about 5 or 10 minutes. At the end of their discussion Newhall walked over to Schwartz and said, "[w]e'll work something out." After this conversation everyone went back to the conference room. The meeting continued until about 4 P.M., when it broke up, and Schwartz returned to Boston.[96]

The following morning, while in his office, Schwartz received a telephone call from Hanley.[97] Hanley told Schwartz that he understood that Schwartz "had been in Newark the day before and that they said that they would work something out for" him. He asked whether Schwartz knew what they were going to work out and Schwartz said he did not.[98]

About 2 or 3 days later Schwartz was at his office when he received a telephone call from Newhall. Newhall said, in substance, "that he was working on that matter and was making some progress and that . . . [Schwartz's] assessment was to be $2,000, payable in instalments over two years." Schwartz said, "I don't know why I should get involved in a matter that was a problem for the big chains to straighten out." Newhall then told Schwartz, in substance, that, "[w]e have got to get the ball rolling because the hearing is taking place in September, and I believe that I will be able to take care of the matter without your help, and you can drop out of it." Schwartz said, "O.K."[99]

Two weeks later Schwartz received another call from Newhall. Newhall said that he was on his way down from

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[96] N (B, H, G with the exception of the last sentence)
[97] N
[98] Hly
[99] N (B, G)

Maine, and asked whether Schwartz would be in his office. Schwartz said, "Yes." Newhall then said, "I will drop in to see you within an hour."[100]

About an hour later Newhall arrived at Schwartz's office. Schwartz was seated behind his desk. Newhall told Schwartz that he had "brought an envelope down for Mr. Hanley." He handed Schwartz the envelope, and just as Schwartz was about to put the envelope in his desk Newhall said, "Louie, you'd better count it because, if it's short, I will be responsible for it." Schwartz counted it. It was $2,000 in either hundreds or fifties. Schwartz said it was correct, and put it in his desk. Newhall then mentioned that Schwartz's office was conveniently located in Boston, and asked whether Schwartz would have any objection "if Charlie MacDermott and Jack McHenry, Sr., dropped an envelope off." Schwartz replied that he had no objections. Newhall also mentioned that "the assessment was to be paid in equal — in instalments over a period of two years, to coincide roughly with the income tax period, and that the first payment was to be in two instalments." Newhall stayed for a total of about 15 minutes and after he left, Schwartz put the envelope in his private safe.[101]

The following day Schwartz received a telephone call from McHenry who asked whether Schwartz would be in. Schwartz replied that he would be. About 10 minutes later McHenry arrived at Schwartz's office. McHenry handed Schwartz an envelope and said, "[t]his is for Martin." The envelope felt as if there were several pieces of paper in it. McHenry then said, "Louis, I put your telephone number on the envelope. Will you please erase it?" Schwartz erased the telephone number, and put the en-

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[100] N (B, G).

[101] N (B, N, G) MacDermott was president of Merchants Acceptance Corporation, or "MAC". McHenry was president of Local.

velope in his desk drawer. After McHenry left, Schwartz put the envelope in his private safe.[102]

The following day, while Schwartz was in his office, he received a telephone call from Hanley, about 10:30 A.M. This was sometime in July of 1957. Hanley said, "I understand that you have something for me." Schwartz replied that he did and Hanley suggested that they have lunch. But an hour later Hanley again called and said that he was going to be "tied up" and that he would call Schwartz later that day at Schwartz's home. Before Schwartz left his office he went to his private safe and removed 3 envelopes. He added an envelope of his own containing $500 in large bills.[103] About 4 P.M. that afternoon Schwartz received a telephone call at his home from Hanley who asked, "[i]s it all right to come over to the house?" Schwartz replied, "Yes." About 15 or 20 minutes later Hanley drove up to Schwartz's home, entered and went into the library. Schwartz was alone in the house and handed the envelopes to Hanley who left immediately.[104]

During the year 1958, Schwartz made approximately 4 more payments to Hanley. All of these payments were made in the men's room of the Parker House Grille and each was in the amount of $250. They were made in quarterly instalments on or about March 15, 1958,[105] June 15, 1958,[106] September 30, 1958,[107] and December 15, 1958.[108] Thus Schwartz paid Hanley, on behalf of Coleman, a total of $1,000 during 1958.

Near the end of 1958, Schwartz received a call from Glynn who asked him if he had seen Hanley lately.

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[102] L (B, N, G)
[103] L, N, Hly (B, G)
[104] L, N (B, G)
[105] L, N, Hly 10272 (B, G)
[106] L, Hly counts 3 and 4 of 10272 (B, N, G)
[107] L, Hly 11993 and counts 5 and 6 of 10272 (B, N, G)
[108] L, N, Hly counts 7 and 8 of 10272 (B, G)

Schwartz said, "[n]o, I haven't seen him for about six months." Glynn responded, "Baloney! I saw Martin a few days ago, and he said you are the only one who paid his instalment or assessment on time." [109]

Heath testified that he paid Hanley a total of about $2,000 on behalf of American as its proportionate share during 1958. Cash payments of about $500 were made quarterly on or about March 15, 1958, June 15, 1958, September 15, 1958, and December 15, 1958.[110]

Heath also testified that in the summer of 1958 he attended a meeting in Hanley's office concerning schedule O of the annual report form for small loans licensees (delinquency schedule). Representatives of other companies in the industry were also present. The persons present included McHenry of Local, Glynn, regional public relations director for the Beneficial companies, Engle, who did public relations work in Massachusetts for Household, and others.[111] From time to time Edward Counihan, the Commissioner of Banks, was present. The industry representatives sought changes in schedule O. Hanley stated, in substance, that he had "no intention of backing off on Schedule O." He stated that he had an early appointment, and did not have time to discuss other matters which the industry was trying to bring into the meeting.[112] Just after this meeting, when only Heath and Hanley were present, Heath had another conversation with Hanley regarding schedule O. Heath said, in substance, "Schedule O would incur considerable expense on the part of American Investment Company." Hanley responded that he "would be willing to back off on Schedule O if the annual arrange-

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[109] G
[110] L, N (B, G)
[111] L, Hly 10272, 11993
[112] L, G, Hly 10272, 11993

ment, which he stated in substance was nine months overdue, was taken care of." [113]

In the fall of 1958, Heath, Hanley, Glynn, Engle and 2 other persons went on a duck hunting trip to Canada. The idea for the trip originated with Hanley. The group first went to the Chateau Frontenac in Quebec and stayed overnight. The next day they went to the Isle de Grues in the St. Lawrence, about 100 or 150 miles from Quebec. They stayed on the island for 4 days, shooting geese or ducks. Glynn, Engle and Heath stopped at Valle's Restaurant in Portsmouth, New Hampshire. There they had an accounting of the various expenditures of the trip, so that the 3 of them shared equally. The total amount involved was somewhere between $1,500 and $1,800.[114]

In the early part of 1959, Heath spoke to Hanley concerning the scheduling of payments. Hanley objected to payments 4 times a year and wanted them paid twice a year — on March 15 and September 15. Heath reported this conversation to his superior, Redfield.[115]

Around March 15, 1959, Heath paid Hanley about $500 in hundred dollar bills.[116] On approximately the same date Schwartz gave Hanley $250 in the Parker House men's room.[117] Schwartz gave him an additional $250 in the same place between June 15 and June 30, 1959.[118]

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[113] Hly 10272, 11993. Exhibit 168 (admitted for purpose of showing whether Heath, Redfield and American were conspirators—admitted against B, G, L, N [II 111 tr. 6353]) is a letter to Redfield in which Heath describes the above events and adds that "I presume that it is possible that you have information of a different nature from some other source but from where I sit . . . Schedule O is definitely linked with the annual arrangement." Heath notes, in the course of exhibit 168, that "[i]n the Commissioner's presence . . . [Hanley] made the reference to his favorite parable: 'What have you done for me lately?' "

[114] G, Hly all indictments except 10272, 11993, 11968 (B)

[115] Hly (B, L, G)

[116] L (B, G)

[117] L, Hly counts 9 and 10 of 10272 (B, G)

[118] L, Hly counts 11 and 12 of 10272 (B, G)

Schwartz testified that during 1958 or early 1959, he had a telephone conversation with McHenry about the Hanley payments. McHenry said, "I am going out of town. I may be gone for ten days, possibly two weeks, and there is an instalment due Mr. Hanley. He raised the roof when I was late the last time and made an awful smell about it. Would it be all right if I send a payment up to your office with Mike Sands?" Schwartz just said, "O.K." That same day Sands, an employee of Local, arrived at Schwartz's office and handed him a sealed envelope. Schwartz put the envelope in his desk. A few minutes later, after Sands left, Schwartz put it in his private safe. A day or 2 after that Schwartz took the envelope out, added it to 1 of his own, and delivered both to Hanley. This took place in the Parker House men's room, on 1 of the occasions already described above.[119] Sands's testimony corroborated this incident.[120]

In late 1959, Heath, in a conversation with Glynn, told him about a suggestion made by Bean of State Loan and Finance that "he [Bean] and others in the industry might want to come into the present annual program, because those that were not in would have more difficulty, in his opinion, than those that were." Glynn told Heath that he was already aware of Bean's suggestion, having heard of it from his home office.[121]

In late 1959, or early 1960, Heath had another conversation with persons in the industry regarding Bean's suggestion. This took place in New York City in a function room at either the Roosevelt or the Commodore Hotel. A number of people were present, including Heath's superior, Redfield. Other persons present included Farrell and

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[119] L, Hly 11993 and counts 5 and 6 of 10272 (B, N, G)
[120] L (B)
[121] G (B)

Glynn and Lerch.[122] The persons at the meeting were sitting around a table, in close proximity to each other. Several subjects were discussed at this meeting. One of these related to Hanley. Concerning Hanley, Farrell said, in substance, "[n]ow we come to the problem of expanding the MJH annual program." A figure of $18,000 was mentioned by 1 of the persons present. Lerch, Farrell and Redfield, in substance, "stated that they were in favor of the program" and that the shares for the companies which they represented "were to be based on the percentage of the outstandings of the various individual companies." Farrell and Redfield stated in substance that they had knowledge that Schwartz and MacDermott, ". . . members of the previous program were unhappy about the burden they were carrying in that program, based on the smallness of their organization as compared to their share in the program." Farrell and Redfiield stated that "if a readjustment was not made . . . these members might withdraw." [123]

During October, 1959, Schwartz was negotiating with McHenry concerning a sale of 2 of Schwartz's offices to Local. A sale was negotiated, and a contract signed. About a week before the date set for the passing of papers McHenry came to Schwartz's office. In the course of their conversation McHenry said to Schwartz, "I was up to Boston and saw Martin, and I told him I was interested in buying the two offices, and Martin said it was o.k., but he wanted $2,000 from . . . the buyer, and $2,000 from . . . the seller, to approve the deal." Schwartz said, "[d]o you think it is necessary? We're just selling the offices. Why the $2,000?" McHenry replied, "Well, that's the deal. Take it or leave it." Schwartz then said, "[i]f that's the only way I can sell, I will have to pay the $2,000."

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[122] F, G (B, H)
[123] F, G (B, H)

Around December 20, 1959, Schwartz paid this $2,000 to Hanley. The payment, in large bills, was made at the Parker House Grille. On the day set for the passing of papers Schwartz was informed that Local had decided not to purchase the offices.[124] Shortly thereafter Schwartz sold these 2 offices to a third party.

Not long after the December payment to Hanley, Schwartz received a telephone call from Glynn.[125] Glynn said, "Louis, Charlie MacDermott is kicking like the devil about his assessment, and we have cut it down to a thousand dollars, and we have cut your assessment down to $750." Schwartz said, "I took care of my assessment months ago." Glynn then said, "[t]his is a brand new deal." Schwartz said, "I don't see why I should have to pay $750. What is it for?" Glynn said, "Louis, you know we're having a terrible time with Hanley. Everything we try to do he objects to, unless he's taken care of, and we've worked out something where he will agree to let us sell an office, move an office, change the name of the company, without any objection from him. And you know, he is harassing us terribly." Schwartz told Glynn, "[w]ell, to avoid harassment, I will have to go along with it, but I won't pay $750." Glynn replied by saying, "[w]ell, we couldn't bother with less than 500." Schwartz said, "O.K." Glynn also said that "Hanley objects to four instalments a year. He now wants it twice a year, March and September."[126]

Early in 1960, subsequent to the filing of new temporary regulations by the small loans division, Heath conversed with Hanley about several matters in which American was interested. Referring to American's head office, Heath said, "St. Louis desires the elimination of the Schedule

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[124] I.
[125] I.
[126] G (B, H, F)

N and O. Also, St. Louis wishes to get your permission . . . to file monthly reports on a short-form basis for the individual licensees and one composite long-form report for the total Massachusetts operation." Hanley said that he would consider these requests; that he intended to be co-operative in the future; and that he was critical of the action of other people in the same area.[127]

On another occasion in early 1960 Hanley told Heath, in substance, "that the present temporary regulations were only temporary and that he might not be quite so understanding when it came to filing the permanent regulations because of the delay in the so-called 'Hanley Program.'"[128]

Between March 15 and March 30, 1960, Hanley received a payment of $250 from Schwartz in the men's room of the Parker House.[129] Hanley also received a payment from Heath in the amount of $2,325 in May of 1960.[130]

Heath received the funds which he paid to Hanley in May of 1960 from a Boston lawyer, one Mr. James Boudreau.[131] Prior to the May payment, Heath received a bill

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[127] Hly on all indictments except 10272, 11968 and 11993

[128] Hly on all indictments except 10272, 11968 and 11993 (B, H, F, G, P). In exhibit 173, Heath reported to Redfield, on March 29, 1960, that, "Marty is considerably perturbed at the moment at certain delays. He is now pointing out that the present regulations are only temporary and that because of such delay his attitude may not be quite so understanding when the new permanent regulations are issued. Last week he sent a telegram to Bob Miller and I understand this week he has sent one to DeWitt. Possibly Mr. Farrell has brought you up to date on this situation at your conference in St. Louis. I hope Beneficial can work this situation out this week. Further delay will only cause considerable loss of ground and make it much more difficult to obtain concessions from Marty which up to this episode could have been had for the asking." (Ex. 173, admitted as to B, H, G, F for the limited purpose of showing that Heath and Redfield were co-conspirators, II 111 Tr. 6353, 6372).

[129] L, G, Hly 10282 (B, H)

[130] F, G, Hly 11972 (B, H)

[131] G, F, Hly 11972

from Boudreau, dated April 13, 1960, and a covering letter. These are in evidence as exhibits. The letter, signed by Mr. Boudreau, states, "Dear Bill: Enclosed please find my bill to the Public Finance Company for legal services rendered. I hope this meets with your approval." The bill is in the amount of $6,500.[132] Upon receipt of the bill and covering letter Heath forwarded them to his superior, J. Miller Redfield.[133] On May 10, 1960, Redfield wrote to Heath stating that, "[t]he Boudreau bill has been o.k'd and the check will go out today. Just in case the IRS should challenge that bill in our books, I told Bruce [Snow] that it was for services rendered to you in connection with the study of the rate case and hearings and frequent consultations with you. You should advise Mr. B." "Mr. B" refers to Mr. Boudreau. The name "Bruce" refers to Mr. Bruce Snow, general counsel for American, who approved all attorneys hired by the Company and all bills rendered to the Company. In fact Mr. Boudreau performed no legal services in connection with the rate case and there were no legal consultations.[134] A day or so before making his May, 1960, payment to Hanley, Heath went to Mr. Boudreau's law office in Pemberton Square, Boston, and received from him $3,000 in hundred dollar bills. This sum was a portion of the payment Mr. Boudreau had received from Public for the April 13, 1960, bill. Within a day or 2 of this meeting with Mr. Boudreau, Heath used these hundred dollar bills to make the May, 1960, payment to Hanley.[135] Mr. Boudreau testified that he received a check in payment of the April 13, 1960, bill, and that he performed no legal services for Public or American.[136]

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[132] G, F

[133] G, F, Hly 11972

[134] B, H, F, G .

[135] G, F, Hly 11972

[136] B, H, G, F, Hly 11972. Near the end of May, 1960, Heath received a longhand memo from Redfield. Redfield's memo reads, in

During 1960, Hanley had a number of conversations with various persons in the industry concerning modification of the forms used in reports to the department and the forthcoming new regulations governing the activities of licensees. In early 1960, Hanley had a conversation with Heath in which he told Heath that he intended to approve the elimination of the long form monthly report for licensees. In May, 1960, prior to the time that Heath received his cash for the Hanley program from Mr. Boudreau, Heath had another conversation with Hanley concerning the monthly report form. Hanley said that he would eliminate the monthly report, "when other matters had been taken care of." [137]

In July, 1960, Hanley met with Heath, Glynn, and perhaps 2 other persons at the Provincetown Inn, in Provincetown. At this meeting Hanley finally gave Heath written permission for American to file the short form monthly report. Hanley also sent a telegram to American's home office in St. Louis to the same effect. Hanley asked Heath to keep confidential the concession he had made to American regarding monthly reports and that Beneficial was the only other company that had been given permission not to file monthly reports. At the meeting the proposed regulations were also discussed. Shortly after this meeting the proposed form of permanent regulations was issued by the Bureau of Loan Agencies.[138]

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pertinent part, as follows: "Incidentally, I assume you have the proceeds of the attorney's fee in safety deposit box. Don Jr. wants a record of these things so please send me, confidentially, a statement showing you are holding these funds and then get me a report as they are expended so he can keep a running balance." (Admitted against B, H, F, G). Heath testified that the phrase "Don Jr." referred to Donald Barnes, Jr. — admitted against B, H, G, F. In 1960 Barnes was a vice-president of American. At the time of trial he was president of American. (Admitted against B, H, G, F).

[137] Hly on all indictments except 10272, 11968, 11993 (B, F, G, H, P)

[138] G, Hly on all indictments except 10272, 11968, 11993 (B, H, F, P)

Between September 15 and 30, 1960, Schwartz made another payment to Hanley.[139] About the same time, Heath paid Hanley $2,325.[140]

Heath obtained the funds from which he made this payment from a Boston attorney, one Mr. Stanley Berenson. Heath picked up the money from Mr. Berenson over a period of time in small amounts of $100 or $200. Mr. Berenson had sent a bill to Public earlier in 1960 to cover "general retainer." This bill was in the amount of $6,000. After receiving a check for this amount from Public, Mr. Berenson, at various times during the year, turned over $3,000 of the proceeds of the check to Heath. Heath used these funds for the October payment to Hanley.[141] Mr. Berenson corroborated this evidence in his testimony.[142]

In March of 1961, Schwartz had a telephone conversation with Hanley. Hanley asked Schwartz if he would like to have lunch and said, "We better eat at a different restaurant, because some of the legislators had remarked that I was always seen at the Parker House with somebody in the loan business." Schwartz suggested Cobb's Restaurant on the first floor of his office building at 18 Tremont Street. Hanley said, "O.K." Hanley had lunch and afterward went to the men's room where Schwartz gave Hanley an envelope containing $250, which Hanley put in his inside jacket pocket.[143]

In the spring of 1961, Heath had a telephone conversation with Glynn. Heath testified that, "Mr. Glynn stated . . . he made a payment to Mr. Hanley for his company . . . [and] that in taking the envelope out of his pocket Mr. Hanley took the envelope. He further informed me there was an additional $825 in the envelope over and

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[139] G, L, Hly 10281 (B, H)
[140] F, G, Hly 11970 (B, H, P)
[141] G, F, Hly 11970
[142] B, H, G, F, P, Hly 11970
[143] G, L, Hly 10282 (B, H, P)

above the amount of the payment which Mr. Glynn was supposed to make. In substance, he then asked me if I would treat this as an adyance on his part to me in order to avoid an embarrassing situation. I, in substance, agreed."[144]

Shortly thereafter, in April or May of 1961, Heath made another payment to Hanley. The amount of the payment was $1,500, and it was made in Boston. Heath obtained the funds with which he made this payment to Hanley from Mr. Berenson, from whom he had obtained the funds for the previous payment in October, 1960. He received the money in small amounts, such as $100, $200, $300 or $400 over a long period of time.[145]

Mr. Berenson testified that early in 1961, he had sent Public a bill for $6,300 and had received a check in full payment of the bill. During the year he paid to Heath $3,000 of the proceeds of the check in small bills at different times of the year.[146]

Early in September, 1961, Schwartz again paid Hanley $250 in the men's room of Cobb's restaurant.[147]

In September or October, 1961, Heath gave Hanley $1,500 in small bills. This money also came from the $3,000 fund which Heath received from Mr. Berenson throughout 1961. Shortly thereafter, Heath gave Hanley an additional $825 which was the money received by Heath as a result of Glynn's "advance" to Heath in the spring of 1961.[148]

The defendant Pratt assumed his duties as Household's regional director of public relations for New England in 1959, and remained in that position until 1963. From early 1961 through the mid-summer of 1963, Heath met with Glynn and Pratt on a regular basis. Heath, Pratt and

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[144] F, G (B, H, P)
[145] F, G, Hly 11969 (B, H, P)
[146] B, H, G, F, P, Hly 11970, 11971
[147] G, L, Hly 10279 (B, H, P)
[148] F, G, Hly 11969, 11971 (H, B, P)

Glynn represented Public, Household and Beneficial, the "Big Three" in the industry. They met in various restaurants in Boston and, on occasion, at various motels in other States. The frequency with which the meetings were held varied from once every 2 or 3 weeks to once every 2 or 3 months. The meetings were most frequent around April 15 and September 15. In the industry the meetings of these 3 men were referred to as meetings of the "loose-knit ommittee." In the course of these meetings the payments to Hanley were referred to as the "MJH Program." At meetings of the "loose-knit committee," Heath made reports to Pratt and Glynn of the payments which he made to Hanley. On various occasions, as part of the meetings of the "loose-knit committee," Heath, Glynn and Pratt made calculations concerning the participants' shares in the "MJH Program." These calculations were made during the years 1961 and 1962. One of the calculation sheets is in evidence as an exhibit. Heath, Glynn and Pratt had conversations relating to calculations concerning the Hanley program.[149]

During either 1961 or 1962, Pratt stated to Glynn and Heath that Lerch would be in town to take care of a certain matter involving the Hanley program. On another occasion, he stated that Barber would be in town to take care of a certain matter.[150] Glynn, during this same period, often reported to Heath and Pratt on whether or not "Beneficial . . . [had] taken care of their commitment on the Hanley Program." In the same period Glynn reported to Heath and Pratt that he was unhappy with the method 1 company was using to get its contribution to the Hanley program to him. Glynn stated, in substance, that "Mr. Al Symmes of Seaboard Finance Company had sent a con-

[149] F, G, P (B, H)
[150] P (B, H, F, G)

tribution to the Hanley Program by means of a cashier's check." [151]

About the last week in July, 1961, Heath received a longhand memo from Redfield. This memo reads in pertinent part as follows: "Last week I had the unfortunate experience of having my pocket secretary stolen. Among other items lost were my own notes and also your figures on our commitments in Mass. I assume you still have your copy of these figures so would appreciate your sending a copy on to me. I would like the total amount allocated to each company and also the distribution quotas."

As a result of receiving this letter Heath sent Redfield the information on a small sheet of paper which appears as follows: [152]

"MJH

BFC	5250
HFC	4100
AIC	4650
STA	500
Fam	500
Sea	550
Lib	700
	1000
Coleman	500
MAC	800
	18,550"

Heath testified that, "MJH" stands for Hanley; "BFC" stands for Beneficial; "HFC" stands for Household; "AIC" stands for American; "STA" stands for State Finance; "Fam" stands for Family; "Sea" stands for Seaboard Finance; "Lib" stands for Liberty; "Coleman"

[151] G (B, H, F, P)
[152] B, F, G, H, P

sfands for Coleman; and "MAC" stands for Merchants Acceptance Corporation. The numbers appearing in the column of figures represent the dollar contributions of the various companies to the Hanley program. The figures refer to the annual payment by these companies.[153]

Early in 1962, Heath had a conversation with Hanley concerning a request by Public to move 1 of its downtown Boston offices. Heath had been asked to see about obtaining approval of the movement of this office. Heath said to Hanley, "Mr. Lutz desires to move the Post Office Square office to Codman Square, Dorchester." Hanley said, "Boston is the largest city in the State of Massachusetts, comprised of various areas which of themselves exceed the population of many other cities and towns. I consider the various areas of Boston as individual towns for the purpose of any agreement I have with you people." Heath replied, saying, "St. Louis [American's head office] feels differently about the situation. They feel that this move comes under the overall umbrella of our agreement with you." To Heath's knowledge, this particular office was never moved.[154]

In March of 1962, Schwartz again had lunch with Hanley at Cobb's restaurant and handed Hanley an envelope containing $250, once again in the men's room.[155]

Around April 15, or May 1, 1962, Heath gave Hanley a payment of $2,325. Heath obtained the funds for this payment from Mr. Boudreau, in the manner previously described. Heath received $3,000 in cash from Mr. Boudreau at a meeting prior to the $2,325 payment made to Hanley in April or May. Heath reported this meeting to Redfield. Mr. Boudreau, prior to the time that Heath re-

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[153] B, F, G, H, P

[154] Hly on all indictments except 10272, 11968, 11993 (H, G, F, P)

[155] G, L, Hly 10278 (B, H, P)

ceived this sum, never performed any legal services for Heath's company.[156]

In August, 1962, Heath attended a meeting at the Chatham Bars Inn in Chatham, Massachusetts. This meeting, arranged by Hanley, lasted 4½ days. In addition to Hanley, 2 employees of the small loans division were present. Glynn and Beneficial's attorney, one Mr. Bob Miller, were also present. During this meeting they discussed certain changes sought by Beneficial in the regulations. The Chatham Bars bill was paid by Public and Beneficial.[157]

In the first or second week of September of 1962, Heath made another payment to Hanley in the amount of $2,275. "It was in the form of hundred-dollar bills with the exception of that part of it which could not be in [a] hundred dollar bill." It was paid directly to Hanley. The source of the funds was an attorney, one Mr. Frank E. Riley, Jr.[158]

In early July of 1962, Heath met with Messrs. Riley and Boudreau in Mr. Boudreau's office. They then went to lunch at the Parker House Grille. At lunch Mr. Riley gave Heath his card. On July 27, 1962, Mr. Riley sent a bill to Public in the amount of $6,000, although Mr. Riley had not rendered legal services to either Public or American. The bill stated that it was for "professional services rendered during 1961-1962 in connection with the Uniform Commercial Code; drafting local legislation; and attendant conferences with company representatives." Mr. Riley received a $6,000 check from Public in payment of this bill.

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[156] G, F, Hly 10286 (B, H, P)

[157] G, Hly on 10273, 10276 through 10282, 10294, 10286, 11969-11972, 10275 (B, F, H, P). Beneficial and Public also paid the bills for meetings held in June, 1960, at the Wequasset Inn in East Harwich, and a motel on Nauset Beach. Glynn and Heath also paid the bill for meetings at the Colonial Motel in Swampscott and the Provincetown Inn. All of these meetings were held to discuss the regulations and proposed changes.

[158] G, F, Hly 10286 (B, H, P)

From the proceeds of the payment of this check he gave $4,500 in cash to Mr. Boudreau.[159] After Mr. Riley gave this $4,500 to Mr. Boudreau, Heath receievd $3,000 of this sum in cash from Mr. Boudreau. Heath used these funds for his payment to Hanley.[160] In their testimony, Messrs. Riley and Boudreau corroborated Heath's testimony.[161]

Some time after September 15, 1962, Schwartz once again paid Hanley $250 just outside the men's room at Locke-Ober's.[162]

In the fall of 1962, about October 16 or 17, Heath attended a meeting in New York related to the Hanley program. About a week prior to that New York meeting, the members of the "loose-knit" committee met at Purcell's restaurant in Boston. At the meeting Glynn gave Heath a piece of paper. There were 2 other copies of this piece of paper at the meeting. Glynn had 1 copy in his possession, and Pratt had the other. At the time he gave the copy to Heath, Glynn said that, "[t]his is an accounting of the program that I will use at the forthcoming meeting."[163]

A portion of this paper, which was introduced in evidence as exhibit 153, contains the following:[164]

	Due MH
"BE	5250
HO	4100
AI	4650
ST	500
FA	500
SE	500
LI	700
	16200"

[159] Mr. Riley gave $4,500 to Mr. Boudreau, instead of $3,000, because he owed him $1,500 on a pre-existing debt.

[160] G, F, Hly 10275, 10286

[161] B, H, G, F, P, Hly 10275, 10286

[162] L, G, Hly 10227 (B, H, P)

[163] F, G, P (B, H, Br)

[164] G, F, P (B, H, Br)

The portion of this exhibit quoted above is in Glynn's handwriting. The abbreviations in the left hand column were used in the meetings of the "loose-knit" committee. Heath testified that "BE" means Beneficial; "HO" means Household; "AI" means American Investment; "ST" means State; "FA" means Family; "SE" means Seaboard; and "LI" means Liberty. The phrase "Due MH" means money payable to Hanley.[165]

Following the meeting of the "loose-knit" committee at Purcell's, Heath, on the 16 or 17 of October, 1962, attended a meeting at the Commodore Hotel in New York. Heath went down by train, and stayed overnight at the Commodore. Heath went to the meeting approximately 9:30 in the morning. The meeting was held in a function room on the second floor. The meeting continued until the middle of the afternoon, with a break for lunch. Those attending the meeting were seated at a table. They included Heath of American, Woodcock of Liberty, Barber and Pratt of Household, Godshall of Family, Thomasch of State and Glynn and Farrell of Beneficial. Heath sat at about the middle of the table. Woodcock sat on his left. Pratt sat on his right. At the end of the table, to Heath's left, were Godshall and Thomasch. Across the table from Heath were Barber, Farrell, and Glynn. This was the seating arrangement in the latter part of the afternoon. Near the end of the meeting, Glynn arose and read aloud from the calculation sheet which is in evidence in part as exhibit 153.[166]

Glynn did not read from the calculation sheet in exactly the manner shown on exhibit 153. He used the names of the companies rather than the initials. Otherwise his reading was the same as is shown on exhibit 153, except that

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[165] F, G, P (B, H, Br)
[166] F, G, P, Br (B, H)

he used the expression the "Hanley Program" instead of "MH."[167]

In addition to what was stated on exhibit 153, Glynn stated, "Liberty owes $700 on the Hanley Program." At this point, "Woodcock interjected himself and interrupted the conversation." He said that "this matter should not have been brought up before this meeting, this matter was not supposed to be discussed during this meeting, and . . . he was very angry that he was being subjected to the discussion of this matter." Woodcock further stated that "Glynn should tell Mr. Hanley that Liberty had no intention of participating in the Hanley program this year." Glynn said, "Mr. Woodcock, why don't you tell him yourself?" Woodcock replied, "Well, you tell Hanley to see me." At about this point the meeting broke up.[168]

Approximately the third week in April, 1963, Heath made another $2,325 payment to Hanley in a corridor outside the men's room at the Durgin Park restaurant.[169] Schwartz also made a payment at this time.[170]

In September of 1963, Heath had a conversation with Glynn relating to the MJH Program. Heath told Glynn "that we had made our April payment to the MJH Program, but in my opinion we were not going to make a September payment." Glynn said to Heath that "Beneficial had made their April payment to Mr. Hanley and that he had no decision as to whether or not the September payment was going to be made."[171] Heath met with Barber of Household in the middle of September, 1963. Earlier that day Heath received a telephone call from Pratt who said, "Nat Barber is going to be in town at the Statler.

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[167] F, G, P, Br (B, H)
[168] F, G, P, Br (B, H)
[169] F, G, Hly 10284 (B, H, P, Br)
[170] G, L, Hly 10276 (B, H, P)
[171] G (B, H, F, Br, P)

He desires to talk to you. Will you come and see him?" Heath said that he would. Heath arrived at the Statler at about two in the afternoon. He went to the suite which was occupied by Barber. When Heath arrived, Pratt was there with Barber and a man who was introduced as a Household public relations representative from the mid-west named McCormick. Shortly after Heath arrived McCormick and Pratt left. After Pratt left Heath had a conversation with Barber. Barber stated that he expected a call from Hanley very shortly. The telephone rang, and there was a conversation. Following the telephone call, Barber said that he was going to join Hanley at the Parker House and asked Heath to remain in the room until he got back. Barber then left and returned about 2½ hours later. He then told Heath that "he thought the Hanley MJH program should continue." Heath stated, "that . . . [he] thought the Hanley program was dead, finished, as far as American Investment was concerned." Heath said that this was "only my personal opinion, that the risk was too great, and in my opinion American Investment would have nothing further to do with the Program." Barber replied, "that he was afraid that would be the position of Household Finance from MacDonald down." Heath "again reiterated that a decision such as this would have to be made at a much higher echelon than either myself or Mr. Barber." Barber then said that "he felt so deeply about the continuation of the MJH Program that, if necessary, he might . . . make payments from monies set aside for another purpose without the knowledge of his superiors at Household Finance." [172]

Near the end of September, 1963, Schwartz made a final payment to Hanley of $250 in the men's room of Cobb's restaurant.[173] On October 24, 1963, after consulting with

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[172] Br, P (as to telephone call) (B, H, F, G, P [remainder])
[173] G, Hly 10273 (B, H, P)

counsel, Schwartz appeared and testified before the Massachusetts Crime Commission.[174]

The foregoing evidence constitutes most of the essential evidence in the second trial. Portions of this evidence will be referred to in treating with the various issues raised by the respective corporate and individual defendants.

B. *THE SUFFICIENCY OF THE EVIDENCE*

The Individual Defendants

1. *Pratt* — Pratt contends that the trial judge erred in allowing the Commonwealth's motions for extensions of the evidence and for a preliminary ruling of conspiracy. He also contends that the trial judge erred in denying his motion for a directed verdict. The grounds for both assignments of error rest in the contention by Pratt that the evidence linking him to the conspiracy was insufficient as matter of law to support the trial judge's rulings.

The evidence originally admitted against Pratt, and offered as tending to connect him to the conspiracies is as follows: Pratt's position at Household included meeting with legislators and other influential persons for the benefit of his company. He represented Household at a meeting of the Rate Board, meetings with supervisory officials of the small loans division, and meetings with other government officials.

From 1961 to 1963, Pratt also met regularly with Glynn of Beneficial and Heath of Public. During these meetings, Heath made reports to Pratt and Glynn concerning bribes paid to Hanley. The "MJH" program was explicitly discussed, and calculations concerning the shares of the 3 companies in the bribes were made.

Pratt was also present at the crucial Purcell's and Commodore Hotel meetings in October, 1962. We have previously recounted the details of these meetings. At these meetings Glynn distributed calculator sheets showing the

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shares of the various corporations in the bribery program. The sheet he gave to Heath is in evidence. Pratt's company was included on the sheets. It has not been shown that Pratt said anything at the Purcell's or Commodore Hotel meetings.

Pratt maintains that his presence at all of these meetings is consistent equally with innocence or guilt, and thus cannot be said to establish his guilt by legitimate proof, under the rule in *Commonwealth* v. *O'Brien*, 305 Mass. 393, 400. As in the first trial, he also relies on *Commonwealth* v. *Beal*, 314 Mass. 210, 222, claiming that he had "mere knowledge of an unlawful conspiracy" and cannot be said to have "actively participate[d] therein and . . . [done] something in furtherance of it."

Yet, the direct evidence of Pratt's participation in these many meetings is not consistent with innocence of the conspiracy or of mere knowledge without adherence to the unlawful agreement. Silence does not preclude proof of adherence to an unlawful agreement where other evidence points strongly to guilt. *Commonwealth* v. *Favulli*, 352 Mass. 95, 113. *Commonwealth* v. *Rudnick*, 318 Mass. 45, 57-59. Even in the case of *Commonwealth* v. *Beal*, *supra*, Beal's brother was held to have actively participated in the conspiracy, although his role was largely one of passive support. *Commonwealth* v. *Beal*, 314 Mass. 210, 222-223. Cf. *Egan* v. *United States*, 137 F.2d 369, 378 (8th Cir.), cert. den. 320 U.S. 788. Pratt's passive support and presence at the many important meetings could be found by the jury as an element in the "concerted action" of the conspiracy. *Commonwealth* v. *Hunt*, 4 Met. 111, 123.

In any event, we are of opinion that Pratt's conduct surpassed merely that of passive support and that he committed *overt* acts in furtherance of the conspiracy. During the meetings with Glynn and Heath, Pratt joined in making calculations as to the relative shares in the

bribery program. He also informed Glynn and Heath that his superior, Lerch, would be in town to take care of a "certain matter." That was obviously "with reference to the Hanley Program." Assisting the other conspirators in this way was evidence that Pratt *actively* sought to further the conspiracy and participated in the "concerted action toward . . . a common purpose" which is the essence of the crime. *Commonwealth* v. *Schnackenberg*, 356 Mass. 65, 74. *Attorney Gen.* v. *Tufts*, 239 Mass. 458, 493-494. *Commonwealth* v. *Galvin*, 310 Mass. 733, 745-746.

2. *Barber* — Barber relies on the same argument as Pratt with regard to the sufficiency of the evidence. In his case, however, there is even more evidence of overt acts in furtherance of the conspiracy to complement the evidence of his adherence to the unlawful agreement.

Barber was Pratt's superior and was supervisor of a number of public relations employees of Household on the eastern seaboard. He was the senior officer of Household present at the Commodore Hotel meeting in October, 1962, when Glynn read aloud the calculations or bribery shares in the Hanley program, including the share of Household. Barber did not raise an objection to the Hanley program, although Woodcock did.

In September, 1963, Barber had an extensive conversation with Heath at the Hotel Statler in Boston. This conversation removes any doubt as to the meaning of Barber's presence at the Commodore Hotel meeting. Barber stated to Heath, "that he thought the Hanley MJH program should continue." Barber continued to say that, "he felt so deeply about the continuation of the MJH Program that, if necessary, he might . . . make payments from monies set aside for another purpose without the knowledge of his superiors at Household Finance."

These statements furnish evidence that the reason for Barber's presence at the important Commodore Hotel

meeting was his adherence to the conspiracy. But they also establish for more. During the Statler conversation, Heath had emphasized that he "thought" the "Hanley program was dead." Barber reacted by urging continuation of the conspiracy. This was an important *overt* act in furtherance of the conspiracy. It is of no importance whether Heath was still a party to the conspiracy. Barber was still a party to it, willing to obtain monies "without the knowledge of his superiors" to pursue it, and was, by his advocacy with Heath, actively seeking to promote its activities. "A conspiracy, especially one which contemplates a continuity of purpose and a continued performance of acts, is presumed to continue until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." *United States* v. *Etheridge*, 424 F.2d 951, 964 (6th Cir.). *See Hyde* v. *United States*, 225 U.S. 347, 369-370.

The judge, therefore, properly ruled in the cases of Pratt and Barber that the evidence admitted originally against them was sufficient as matter of law to permit the jury to find that these defendants conspired with others to bribe Hanley. The judge thus properly admitted against these individual defendants the evidence of the acts, knowledge, and admissions of the other conspirators in furtherance of the conspiracy (*Commonwealth* v. *Benesch*, 290 Mass. 125, 132-133) and properly denied their various motions for directed verdicts. *Commonwealth* v. *Stasiun*, 349 Mass. 38, 51.

C. *THE SUFFICIENCY OF THE EVIDENCE*

The Corporate Defendants

Having concluded that the evidence was sufficient to establish that Pratt and Barber were part of a conspiracy joined in by Farrell, Glynn, Newhall, and Lerch to bribe Hanley, we again turn to the question whether the re-

spective corporate defendants were parties to the conspiracy. As in the first trial the defendants Beneficial and Household, by way of motions for directed verdicts, attack the legal sufficiency of the evidence to connect them to the conspiracy. Similarly, they further assert that the standard for imposing corporate criminal liability, as applied by the judge, was erroneous. The defendant, Local, also attacks the sufficiency of the evidence.

1. *Standards of Criminal Responsibility* — With respect to the correctness of the standard applied by the judge for holding a corporation criminally responsible for the acts of its employees, officers, directors, or agents, we refer to our discussion in the first trial portion of this opinion on that point. What we have said there applies with equal validity to the evidence before us in this trial. The corporate defendants may properly be held responsible for the acts of their agents, officers or employees if there is sufficient evidence to show that the corporation had placed the agent in a position where he possessed enough authority to act on behalf of the corporation with respect to the particular corporate activities associated with criminal conduct. Applying this standard to the evidence, we first consider the evidence admitted against Household, then as against Beneficial and finally, as against Local.

2. *Household* — Household was held criminally responsible for the conduct of Lerch, Barber and Pratt. Lerch served as divisional director of public relations for Household during the earlier part of the period covered by these indictments. Subsequently, Lerch was replaced by Barber who held the same title and performed the same duties as Lerch. As divisional directors of public relations, Lerch and Barber were the immediate superiors of Household's public relations men in Massachusetts as well as in other States in their division. Lerch's and

Barber's superior was the head of Household's entire public relations department, who in the 1962 annual report was listed as H. L. Haugan, a vice-president and director of public relations. In the 1958, 1959 and 1960 annual reports, Lerch is listed on the same page where the president and vice-president are listed under the heading "officers." In the 1962 and 1963 annual reports, Barber is listed under the heading "Other Staff Executives."

Pratt and Warren Engle were the public relations men assigned to Massachusetts between 1960 and 1963. There was ample evidence introduced at the trial, that over a 6 year period Household's public relations men including, Lerch, Barber and Pratt regularly and customarily dealt with legislators and small loans officials, as well as with other industry representatives, concerning matters pertaining to the small loans division, such as regulations, report forms, license fees, and advertising.[175] In addition, Household was represented by Lerch on the executive committee of the Massachusetts Consumer Finance Association during 1957 and 1958, which was active in areas dealing with the supervisor of loan agencies.

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[175] Pratt regularly attended meetings and public hearings with officials from the small loans division and representatives of other companies in the industry. In March, 1960, his name appeared on the bureau's list under the heading "Household Finance Corporation" along with the names of Household's secretary, vice-president and controller. Pratt was present, representing Household, at meetings and hearings concerning revision of regulations on June 30, 1960, August 2, 1960, September 12, 1960, and October 11, 1960. On September 6, 1961, he was present representing Household at a hearing held at the State House concerning an increase in the small loans license fee. On January 10, 1961, and January 15, 1962, he was present representing Household, at meetings concerning the annual report form.

In 1958, Engle attended at least 1 meeting with Leadbetter (assistant supervisor and rate analyst of the small loans division), Hanley, the Commissioner of Banks, and other industry representatives. Engle also spoke with Leadbetter from time to time.

On December 3, 1958, Lerch was present at a meeting at the State House with Hanley, Leadbetter, the Commissioner of Banks and other industry representatives.

This 6 year pattern of sustained aetivity by Household's public relations men comports with the language of Justice Qua (later Chief Justice) in the case of *Hartigan* v. *Eastern Racing Assn. Inc.*, 311 Mass. 368, 370, that "[a]cts habitually performed by an agent may import acquiescence by the principal and become evidence of his authority." See *Cowan* v. *Eastern Racing Assn. Inc.*, 330 Mass. 135, 144. Cf. *C. F. Hovey Co., petitioner,* 254 Mass. 551, 555; Restatement 2d: Agency, § 43.

In addition, there is direct testimony by Don H. Ellis, a vice-president of Beneficial, that the duties of public relations men included dealing with legislators and governmental agencies pertaining to legislative matters, as well as matters involving complaints from "important" persons.[176]

We are of opinion that there is a strong and apparent nexus between Lerch's, Barber's and Pratt's duties for the principal, Household, and their conspiratorial activities. Cf. *Egan* v. *United States*, 137 F.2d 369, 380. It is unnecessary for us to repeat all the evidence we have previously recited. The judge properly admitted against Household evidence of the acts, knowledge and admissions of other conspirators, and correctly ruled that there was sufficient evidence to submit the case to the jury.

3. *Beneficial* — Beneficial was held criminally responsible for the criminal activities of Farrell, Newhall and Glynn, formerly the employees of Beneficial Management. As in the first trial, there is overwhelming evidence of the participation of these individuals in the conspiracy and Beneficial does not dispute this. Nor does it dispute

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[176] Ellis testified that the primary duty of a public relations man "is to enlighten people who formulate public opinion as to the virtues of our business, to enlighten them not only of the problems that we have but what we would like to do, what we are doing, and the need that we are fulfilling."

that these individual defendants were authorized to handle the particular matters in which they were engaged at the time they committed the criminal acts. Beneficial's only essential argument, as in connection with the first trial, is that there is no evidence that these individuals were authorized by *Beneficial* to participate in the conspiracy to bribe Hanley. The thrust of this assertion is predicated upon the fact that none of the individual defendants were officers, directors or employees of Beneficial. It further asserts that there is no proof of agency.

In connection with the first trial, we determined that an agency relationship did exist between Beneficial and Farrell and Glynn. There, we stated the evidence pertaining to the interlocking corporate structure of Beneficial, Beneficial Management and the business trusts doing business in the Commonwealth under the name and style of Beneficial Finance Company. Much of that evidence was also introduced in the second trial and we perceive no need to repeat all of the details here. Briefly, it showed that (a) Beneficial wholly owned Beneficial Management; (b) there was an interpenetration of corporate officers between Beneficial and Beneficial Management; (c) there was a mixture and a dependency of business activities between the 2 corporations and (d) Beneficial held itself out as a single operating entity. With regard to our discussion of this evidence and the application of the *My Bread* case to the evidence, we refer to p. 91 et seq. of this opinion and apply the same reasoning to the evidence introduced at the second trial.

In addition, however, there was direct evidence at the second trial that a high corporate official of Beneficial knowingly permitted Glynn to act on behalf of Beneficial in dealing with Hanley. On October 8, 1959, Jackson Collins, Beneficial's general counsel and a director of Beneficial, wrote to Francis X. Crowley, vice-president and

comptroller of Beneficial Management, concerning "1958 Massachusetts Small Loan Report Schedule N — Consecutive Transactions by Present Borrowers." Collins stated that he disliked the language of this schedule and did not believe that most consecutive transactions by present borrowers were "renewals." He suggested that the word "transaction" be substituted. On October 13, 1959, Crowley replied to Collins, writing that "[u]nder the present situation in Massachusetts we do not believe that it would be feasible for either you or us to write to Mr. Hanley on this matter. We have, however, taken the liberty of sending a copy of your memorandum to Mr. Glynn. It is our thought that he can take this matter up with Mr. Hanley at an opportune time." Despite this admonition by Crowley that "the present situation in Massachusetts" did not feasibly warrant direct contact between high corporate officials of Beneficial and Hanley, Collins subsequently wrote to Hanley stating his position on the forms. Collins attached to his letter to Hanley a copy of the Crowley memo wherein it is stated that Glynn could "take this matter up with Mr. Hanley."

This correspondence, in its most favorable and least incriminating aspect to Beneficial, shows that an upper echelon corporate official of Beneficial acquiesced in the delegation of authority to Glynn to act on behalf of Beneficial in dealing with Hanley. Conversely, in its most incriminating aspect, the correspondence imports knowledge by a director of Beneficial that the "present situation in Massachusetts" referred to the fact that Hanley was being bribed to bestow favors on Beneficial, such as the changing of language in a "Small Loan Report Schedule," and that this director acquiesced in such criminal activity. In view of the evidence admitted against Farrell, Glynn and Newhall, the latter interpretation could reasonably be inferred from the correspondence. In this regard,

the correspondence is a prime illustration of a situation aptly described by Holmes, J. that "[t]he evidence by itself of course did not prove criminal conduct. But it is not necessary that every piece of evidence admitted should be sufficient by itself to prove the crime. Evidence which would be colorless if it stood alone may get a new complexion from other facts which are proved, and in turn may corroborate the conclusion which would be drawn from the other facts." *Commonwealth* v. *Mulrey,* 170 Mass. 103, 110.

The evidence, taken as a whole, was more than sufficient to support a finding that Beneficial conspired to bribe Hanley through the agency of Farrell, Glynn and Newhall. The judge correctly admitted the acts, knowledge and admissions of other conspirators against Beneficial on the conspiracy indictment and, therefore, there was no error in the denial of its motion for a directed verdict.

4. *Local* — Local was held criminally responsible for the acts and statements of McHenry, its president, who died before the trial. Local does not contest the authority of McHenry to commit it to the conspiracy to bribe Hanley, but argues simply that there is insufficient evidence to show that McHenry participated in the conspiracy.

We disagree. The evidence shows: (1) in the summer of 1957, McHenry gave Schwartz an envelope and said, "[t]his is for Martin." McHenry asked Schwartz to erase Schwartz's telephone number on the envelope. The envelope felt as though it had several pieces of paper in it. Schwartz gave it to Hanley when he (Schwartz) paid his own bribe money, and after Hanley had called and said, "I understand you have something for me"; (2) during 1958 or 1959, Schwartz talked with McHenry on the telephone about the Hanley payments. McHenry said, "I am going out of town. I may be gone for ten days, possibly two weeks, and there is an installment due Mr. Hanley.

He raised the roof when I was late the last time and made an awful smell about it. Would it be all right if I send a payment up to your office with Mike Sands?" Sands corroborated the fact that he delivered the envelope to Schwartz. Schwartz testified that he delivered it to Hanley; (3) there was testimony by Schwartz that he and McHenry agreed to pay $2,000 to Hanley as a bribe in exchange for Hanley's approval of the sale of 2 of Schwartz's offices. Schwartz paid Hanley, but the sale was never made.

This evidence, together with Schwartz's numerous payments to Hanley, more than supports the conclusion that Local through McHenry conspired to bribe Hanley. Local's assertion that the evidence is colorless is without merit. McHenry's use of the words "payment" and "installment" in the context of the other evidence creates a reasonable inference that these "payments" or "installments" were bribes.

Similarly, there is no substance in Local's argument that even if Schwartz conspired with McHenry, there is no evidence to connect them with the others. It is sufficient if the evidence shows "concerted action toward the accomplishment of a common purpose." *Commonwealth* v. *Galvin*, 310 Mass. 733, 745. It is not necessary that each defendant have communicated or dealt directly with each other defendant. *Commonwealth* v. *French*, Mass. , — [h]

There was no error in the admission of the acts and statements of other conspirators against it, nor in the denial of Local's motion for a directed verdict on the conspiracy indictment.

D. *CONDUCT OF THE TRIAL*

As in connection with the first trial, various defendants allege error regarding the judge's conduct of the trial.

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[h] Mass. Adv. Sh. (1970) 619, 637-638.

Some of these arguments are essentially similar to those raised in the first trial and, therefore, we deal with them summarily.

1. Household argues that the conspiracy indictment should have been dismissed because of the 6 year statute of limitations, and the other defendants adopt this claim. The argument appears to be based primarily on the theory that the only way the Commonwealth could avoid a conflict with the principle of double jeopardy was by a ruling that conspiracy was not a continuing offence. We have already rejected this contention, noting that the indictments, with their bills of particulars and "Representations of Evidence in [S]upport of Motion for Joinder or Grouping," made it clear that the 2 indictments charged separate conspiracies, the first conspiracy being to bribe Hanley in connection with the 1962 hearing alone, and the second being a continuing conspiracy to pay Hanley annual sums from 1957 through most of 1963. (*Supra,* p. 36.) In disposing of the double jeopardy issue, therefore, we in no way undermined the rule that a conspiracy is a "continuing offence." As to such an offence the statute of limitations does not begin to run until the date on which the continuing offence ends. *Commonwealth* v. *Ross,* 248 Mass. 15, 18. *Commonwealth* v. *Geagan,* 339 Mass. 487, 518-519. The date of the conspiracy indictment is May 8, 1964, which is within the 6 year period of limitation applicable here, since it continued from 1957 to the date of the indictment.

The further argument that allegation and proof of an overt act was necessary to sustain the indictment against the statute of limitations attack is equally lacking in substance. It is the law of this Commonwealth that there is no requirement for any overt act, or allegation thereof, to constitute the crime of conspiracy. *Commonwealth* v. *Judd,* 2 Mass. 329, 336-337. Nor is there any requirement for allegation and proof of renewal of the conspiracy dur-

ing the 6 year period of limitation as distinguished from continuance of the conspiracy. Household's plea in bar and motion to quash were rightly denied and the assignments of error of Household and other defendants based on the statute of limitations must be rejected.

2. Household, Barber and Pratt contend that the judge took insufficient precautions to guard the jury against the possible adverse effects of publicity, both before and during the trial, and therefore a mistrial should have been declared. The facts relied upon by the defendants are identical to those relied upon in connection with the first trial and the issues presented have been previously discussed at length. (*Supra*, p. 144.) Suffice it to say that from a careful examination of the record of the second trial we are satisfied that the judge did not abuse his discretion either in refusing to poll the prospective jurors concerning their pre-trial readings or discussions of the case, or in refusing to instruct them not to read articles or watch and listen to news broadcasts during the trial.

3. Similarly, we treated at some length in connection with the first trial, *supra*, p. 99, the defendants' argument that the judge erred in hearing the Commonwealth *ex parte* on its applications for issuance of process to out-of-State witnesses. We need not elaborate further.

4. Local offered to prove that Schwartz and Heath knew the results of the first trial and the sentences imposed on the defendants in that trial by the judge and the sanctions imposed on the defendants by the Department of Banking. Local contends that the refusal of the judge to admit this evidence was error since it was essential to show that Schwartz and Heath were motivated by bias or personal interest.

In support of this contention, we consider the case of *United States* v. *Colonial Motor Inn, Inc.*, 440 F.2d 1227 (1st Cir.). There, the defendant in a criminal prosecution

made an offer of proof to show the personal interest and motivation of a key government witness. This witness could have incriminated herself if her testimony had not corroborated the government's theory of the case. The jury were unaware of this fact. In addition, her testimony pertained to a crucial issue in the case. In holding that the defendant was entitled to show the personal interest of the witness, the court noted that the prosecution in its final argument relied upon the impartiality of the witness, stating that she had "nothing to gain or lose," when in fact the defendant's offer of proof would have contradicted this statement.

We think the above case is distinguishable on its facts from the case before us. Here, unlike the foregoing situation, the jury were informed of the personal participation of Heath and Schwartz in the criminal activities of the various defendants, because the defendants *incriminated themselves* with their *own testimony*. Therefore, it was self-evident that Heath and Schwartz, since they were not named as defendants in the trial, had a personal interest in testifying for the Commonwealth. In this regard, the position of Heath and Schwartz in this case is similar to the position of one Shea in the case cited above, about which the court said: "[I]f the witness had been Shea himself, cross-examination on the subject of the tax consequences of admitting a taxable receipt might well have been excluded as superfluous, his interest being self-evident." *United States* v. *Colonial Motor Inn, Inc.*, 440 F.2d 1227, 1228 (1st Cir.).

In addition, extensive evidence was elicited from Heath and Schwartz concerning their involvement in the consumer finance industry. The jury were thus well-informed of the benefits these witnesses might obtain should the major loan companies go out of business in the Commonwealth. Secondly, the possibility of prejudice to the other

defendants outweighed the alleged benefit asserted by Local, especially since the personal interest of the witnesses was obvious. Thus, we find no difficulty in holding that the judge did not abuse his discretion as to the scope of proper cross-examination in excluding the offered evidence. *Commonwealth* v. *French*, Mass. , — .[i] *Commonwelth* v. *Nasser*, 351 Mass. 37, 43-44. *Chevillard* v. *United States*, 155 F.2d 929, 935 (9th Cir.).

5. Local contends that the judge erred in admitting against it certain letters and memoranda which were taken from Heath's files. These exhibits were admitted for the limited purpose of showing that Heath, Redfield and American had participated in the conspiracy. They were admitted almost a month after the judge's preliminary ruling that the evidence warranted a finding of a conspiracy which included Local, American, Redfield and Heath. Of course, once such a preliminary ruling has been made, "the acts and declarations of one conspirator in pursuance of the common object are admissible against the other conspirators." *Commonwealth* v. *French*, Mass. , [j] quoting *Commonwealth* v. *Stasiun*, 349 Mass. 38, 50. These exhibits, being the means by which one conspirator advised another of the progress of the conspiracy, were certainly declarations in the pursuance of the object of the conspiracy. There was no error in admitting them against all the members of the conspiracy, including Local.

6. Hanley's contention that he was the victim of "selective prosecution" in violation of the equal protection clause of the United States Constitution is not supported by the record. Hanley's offer of proof was, in substance, that not all the public officials known by the Attorney General to have received bribes were indicted, and

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[i] Mass. Adv. Sh. (1970) 619, 661-662.
[j] Mass. Adv. Sh. (1970) 619, 637.

that various members of the Crime Commission had stated that they were particularly interested in "getting him." Such proof would be insufficient to support a claim of selective enforcement, which requires a showing of some arbitrary classification, such as race or religion, upon which prosecutions are being based. *Yick Wo* v. *Hopkins*, 118 U.S. 356. *Oyler* v. *Boles*, 368 U.S. 448, 456. Mere failure to punish other offenders by itself is no basis for a holding that there was a denial of equal protection. *Moss* v. *Hornig*, 314 F.2d 89, 82 (2d Cir.). Indeed, it may be altogether appropriate to pick out one, or a number of offenders, from a group whose conduct or position is such that a striking example of them can be made "in the expectation that general compliance will follow and that further prosecutions will be unnecessary." *People* v. *Utica Daw's Drug Co.*, 16 App. Div. (N.Y.) 12, 21. Hanley, as the principal public figure involved in the case before us, certainly has no standing to complain of his indictment under any of these standards, especially since he was not the only public official against whom indictments were returned.

7. The defendant Pratt asserts that Heath, on cross-examination, recanted his direct testimony that Pratt had a copy of exhibit 153 (*supra*, p. 228-229) in his possession at the meeting of the "loose knit committee" at Purcell's in October, 1962. From a careful reading of Heath's testimony on cross-examination we are persuaded there was no renunciation of his direct testimony concerning exhibit 153. To the contrary, Heath's testimony on cross-examination was consistent with his direct testimony which placed exhibit 153 in Pratt's hands at the meeting of the conspirators.

8. Household contends that the jury should have been instructed that if a witness is shown to have testified falsely concerning a material matter the jury have a right

to reject all of his testimony. Household argues that Schwartz's and Heath's financial interests in the outcome of the trial and their dislike of Hanley may have motivated them to testify falsely. Household also points to certain allegedly inconsistent statements.

The record reveals that the jury were adequately instructed on these points. They were instructed that they must consider contradiction and inconsistencies "in deciding whether . . . [they were] going to believe any or all of" the testimony of witnesses. The jury were also instructed to consider carefully the interest of a witness in a conviction, or the personal feeling of a witness toward a defendant. The charge as a whole and in context adequately covered the relevant factors to be considered in the evaluation of testimony. *Commonwealth* v. *Greenberg*, 339 Mass. 557, 585. There was no error in refusing to give the instructions requested. *Ducharme* v. *Holyoke St. Ry.*, 203 Mass. 384, 397.

9. Beneficial contends that the judge erred in refusing to allow its motion for a mistrial based on the length of time which elapsed from the time Beneficial rested its case and the time the case was submitted to the jury. The second trial required 222 trial days. The Commonwealth rested on March 6, 1968, and Beneficial rested on March 21, 1968. All of the other defendants except Hanley, who rested on May 27, rested during March or April. The case went to the jury on June 7, 1968.

Beneficial concedes that the judge could not have let its case go to the jury before the others, because such a procedure would prejudice the other defendants. The judge was thus left with little choice but to proceed as he did. While there may be cases of such a nature that a period of 2 months between the time when a defendant rests and the time when a conspiracy case is submitted to a jury is so prejudicial as to be a denial of a fair trial, this is not

one of them. Had all but 1 defendant rested immediately, the mere fact that the remaining defendant chose to put on a defence that consumed 2 or 3 more months of trial does not automatically call for a mistrial. Otherwise conspiracy cases could seldom be tried to conclusion. As we held in *Commonwealth* v. *French,* Mass. , ,[k] the receiving of further evidence from other co-defendants after their alleged co-conspirator had rested is within the sound discretion of the judge. We see no abuse of discretion.

10. Pratt and Barber argue that it was error for the judge to refuse to poll the individual jurors after the return of the verdicts. However, as we noted, *supra*, p. 97, the settled law of this Commonwealth is otherwise. *Commonwealth* v. *Goldenberg,* 338 Mass. 377, 386.

11. Hanley, who appeared pro se in the second trial, contends that his convictions must be reversed because the judge did not comply with our Rule 3:10 in advising him of his right to counsel. He further asserts that the judge committed error in permitting him to appear pro se and in conducting certain proceedings in his absence.

With respect to the contention charging a failure to follow Rule 3:10, it should be noted that Hanley was represented by counsel in the first trial. After that trial his attorney made a motion to withdraw, at which time the judge said to Hanley: "There is a standing order in Suffolk County that a lawyer who once files an appearance for a Defendant in a criminal case may not withdraw that appearance without leave of court." Hanley then informed the court that he understood, but preferred to appear pro se in the second trial. The judge was further informed that Hanley was a law school graduate and a member of the Massachusetts Bar.

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[k] Mass. Adv. Sh. (1970) 619, 655

It is apparently Hanley's contention that his convictions should be reversed on any or all of the 3 following grounds: (1) the judge did not advise him of his right to counsel as required by Rule 3:10; (2) the judge did not file a written certificate showing that he had waived counsel as required by Rule 3:10; and (3) he was incompetent to represent himself. While many members of the bar might concur with the third ground on the sole basis that an attorney should not represent himself, the defendant here fails to point to even 1 instance of his alleged incompetence. We are therefore not persuaded by this argument. The alleged ground that the judge did not advise him of his right to counsel is contrary to the record, which shows that the judge informed him that his attorney could not withdraw without the court's permission. That Hanley understood can be inferred from his expressed desire to represent himself in the second trial. In addition, since Hanley was an attorney, it was unnecessary for the judge to say more.

Another question presented by Hanley in this grouping of arguments is whether it was error for the judge to proceed with the trial without requiring Hanley to file a written waiver of counsel in accordance with Rule 3:10. There is no doubt that this requirement is an important one. The written waiver rule, however, was promulgated in order "to eliminate to the greatest possible extent all questions arising from lack of representation by counsel." *Mulcahy* v. *Commonwealth*, 352 Mass. 613, 615. Written waivers are required to avoid "ex post facto inquiries" concerning the right to counsel. *Cardran* v. *Commonwealth*, 356 Mass. 351, 353. In this case no such written memorandum was necessary to memorialize the waiver of counsel since the exchanges between Hanley and the judge on this subject appear in the transcript. It is therefore apparent that the purpose and spirit of the rule were fulfilled.

Hanley's final point that he was prejudiced by some proceedings that took place in his absence on December 4, 1967, is utterly without merit. The judge specifically said he would proceed only with matters that did not affect or involve Hanley and this is precisely what the judge did. The only matters covered in Hanley's absence were the direction of verdicts with respect to other defendants.

12. Household, Beneficial, Glynn, Farrell and Newhall object to the expansion by the judge of limitations on 66 items of evidence during the course of the trial. The objection raised is in all respects similar to that raised by these defendants and others to the comparable procedure followed by the judge in the first trial. In the second trial, as in the first, the Commonwealth moved during the course of the trial for a preliminary ruling of conspiracy. It filed simultaneously a series of 8 motions to expand the limitations on certain portions of the evidence. The judge made a preliminary ruling of conspiracy and expanded the limitations on certain portions of the evidence. Also, as in the first trial, the judge did not in every instance lift the original limitations so as to admit a given item of evidence against all the defendants who could have been found to be conspirators with the defendants against whom the evidence had been originally admitted. The instruction to the jury requested by Household relative to the limitations on the evidence, identical to the one requested by it in the first trial, was likewise omitted by the judge in the second trial.

The defendants have not made any arguments which were not dealt with by us in our discussion of this issue as it arose in the first trial. Therefore we refer to that portion of our opinion, *supra*, p. 170, which treats with this matter. We discern no need for further elaboration other than to note that the defendants' arguments with respect to the second trial are made weaker by 2 features

of this trial. First, the judge stated that the reason he expanded the limitations was because he adopted the rationale suggested by the Commonwealth for the selective expansion of the limitations; namely, "to limit the acts and declarations of other co-conspirators, as to . . . [those] specific defendants who are in for only a limited time, to coincide roughly with the period of time that each co-conspirator was a member of the conspiracy." To the extent that the judge found that the Commonwealth's motions did not "reflect the application of [that] point of view" he denied them. Secondly, the judge's instructions to the jury on the subject of remembering limitations were even more thorough than they were in the first trial. He explicitly told the jury that "[i]f you find yourselves in a state of mind where you are unable to recall whether particular evidence was or was not admitted as to a particular defendant or count, then you may not consider that evidence as to that defendant or count. A defendant is to be judged solely on the evidence which you can remember now, with all these limitations, was admitted as to him or it on the particular count as to which you are now or will then be trying to determine his or its innocence or guilt." The defendants' argument that the limitations "formed a senseless pattern" does not withstand analysis. There was no error.

13. It is claimed by Household that it was error for the judge to make a preliminary ruling that it could have been found that McHenry, who had died about a year and one-half before the grand jury returned any of the indictments here involved, and who was not mentioned in the conspiracy indictment, was a co-conspirator in the conspiracy charged in Indictment No. 11908. Barber, Pratt and Local have adopted Household's argument. This issue was raised by them, at the trial, by motions for a mistrial,

which the judge denied. The motions were filed by the 4 defendants after the judge's preliminary ruling.

Household's argument is identical to the one it has levelled against the judge's similar ruling in the first trial, namely that it could have been found that Hanley was a co-conspirator in the conspiracy to bribe Garfinkle charged in Indictment No. 11910. We need not repeat that argument. The facts here are somewhat different, however, inasmuch as the judge found that "[t]he Special Grand Jury which returned . . . Indictment No. 11,908 knew the identity of John L. McHenry, Sr., and of his alleged participation in the alleged conspiracy at the time it returned this indictment." Nonetheless, assuming that there was a variance between the allegations in the indictment and the proof offered at trial, it was not such as to call for a mistrial because, as the judge found in his decision on the motions, "the four (4) Defendants who are parties to the Motions involved . . . have not been prejudiced in their defense or in any other respect by the variance . . . . Nor have they been prejudiced by the action of this Court in respect to any ruling or preliminary finding that the late John L. McHenry, Sr., was a party to the conspiracy alleged in said indictment. (See: G.L. c. 277, § 35)."

14. Household argues that "the trial court erred in failing to recognize that the evidence [in the second trial] reflected two separate conspiracies, rather than the one charged in the indictment; and further erred in the instructions by which the case was submitted to the jury [on the question whether the evidence showed a single conspiracy or multiple conspiracies]." Household raised this point at 4 stages during and following the trial; it formed the basis for several motions filed by Household for a mistrial, a directed verdict, or a new trial. Household's argument on this point has been adopted by Local, Barber, and Pratt.

The issue whether the evidence has shown one conspiracy or several is one of fact which is normally a matter for the jury. *United States* v. *Varelli*, 407 F.2d 735, 746 (7th Cir.). Household does not seem to contest this, but contends that there was insufficient evidence here of a single conspiracy to warrant submitting this question to the jury.

Household emphasizes the testimony of 1 conspirator, Schwartz, that he believed there were 2 separate and distinct plans: one to bribe Hanley in connection with the 1957 rate hearings of the Rate Board, involving payments spread out over 2 years, and the other to influence Hanley's decisions on routine administrative matters involving annual payments beginning in 1959. The fact that 1 conpirator was under the impression that there were 2 conspiracies, rather than 1, is not determinative of whether there was in fact 1 conspiracy or 2. *Coates* v. *United States*, 59 F.2d 173, 174 (9th Cir.). Furthermore, there was evidence to the contrary that the payments made to Hanley in 1957, 1958 and 1959 were for other matters in addition to the 1957 hearings, and that the payments after 1959 were connected with the earlier one. Although the participants in the later payments were not identical to those who had made the earlier payments, this fact does not negate the existence of 1 conspiracy during the entire period. *United States* v. *Varelli*, 407 F.2d 735, 742 (7th Cir.). On the state of the evidence before him, the judge properly submitted the question whether there was a single conspiracy or multiple conspiracies to the jury.

The judge's instruction to the jury that they should acquit all of the defendants if they found that the evidence established the existence of more than 1 conspiracy from January 1, 1957 to May 8, 1964, was likewise correct. Household's objection that it precluded the jury from acquitting less than all of the defendants if they found

that those defendants had not participated in a single conspiracy fails to take into consideration certain other portions of the judge's instructions. The jury was thoroughly cautioned that if they found "beyond a reasonable doubt that there was a single conspiracy as alleged . . . , then they must decide which, if any, of the defendants now on trial were parties to that agreement." The judge told them repeatedly that they "should consider separately from all the other defendants the question of whether . . . [a] defendant did or did not become a party to an agreement to bribe Martin J. Hanley." There was no error.

15. The final issue we deal with concerns Barber's and Pratt's assertions that the judge's instructions to the jury concerning participation in the conspiracy were error. As we have mentioned throughout this opinion no overt act need be shown in furtherance of the conspiracy and the purposes of the consipracy do not have to be carried out. *Commonwealth* v. *Hunt,* 4 Met. 111, 125. *Commonwealth* v. *David,* 335 Mass. 686, 696. The instructions of the judge were identical in all essential respects to the instructions in the first trial and were correct.

All judgments affirmed.

APPENDIX A

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APPENDIX B

A List of Individuals and Corporations Involved in COMMONWEALTH vs. HOUSEHOLD FINANCE CORPORATION & others (No. 14,584) and COMMONWEALTH vs. BENEFICIAL FINANCE COMPANY & others (No. 14,585); "THE FIRST AND SECOND SMALL LOANS TRIALS."

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
AMERICAN INVESTMENT COMPANY OF ILLINOIS: A Delaware corporation having its headquarters in Missouri. It controls several small loans licensees of the Commonwealth through Public Finance Company.	No Indictment	Named in Indictment 11908 as a co-conspirator but not as a defendant.	No
BARBER, NATHANIEL W.: Eastern Director of Public Relations for Household Finance Corporation. Successor to Lerch and superior of Pratt.	Guilty Indictment. 11900 11910 11896	Guilty Indictment 11908	Yes
BEAN, CALVERT I.: Executive of State Loan and Finance Corporation.	No Indictment	Directed Verdict; Not Guilty Indictment 11908	No
BENEFICIAL FINANCE COMPANY: A Delaware holding company carrying on the business of making small loans in the Commonwealth by means of three Massachusetts business trusts.	Guilty Indictment 11900 11901 11910	Guilty Indictment 11908	Yes

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
BENEFICIAL MANAGEMENT CORPORATION: ..... A Delaware corporation. It is a wholly owned subsidiary of Beneficial Finance Company which performs all legal and accounting services for Beneficial Finance Company's three Massachusetts business trusts.	Indicted 11900 11910 but not tried.	Indicted 11908 but not tried.	No
COLEMAN FINANCE COMPANY: ..... A wholly owned subsidiary of Community Finance Company. It is licensed to carry on the business of making small loans in the Commonwealth. Louis Schwartz, as President of Community Finance Company, was principally in control at the time of these cases.	No Indictment	No Indictment	No
COMMUNITY FINANCE COMPANY: ..... A Massachusetts business trust. It is the owner of Coleman Finance Company; President and Trustee—Louis Schwartz.	No Indictment	No Indictment	No

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
ENGLE, WARREN: ..... Public Relations Representative for Household Finance Corporation in Massachusetts and neighboring States; replaced by Pratt; thereafter Engle worked for Liberty Loan Corporation. Lerch was Engle's supervisor at Household Finance Corporation.	No Indictment	Indicted 11908 but not tried.	No
FAMILY FINANCE CORPORATION: ..... A Delaware corporation licensed to engage in small loans business in the Commonwealth.	Directed Verdict; Not Guilty Indictment 11900 11910	Directed Verdict; Not Guilty Indictment 11908	No
FAMILY FINANCE MANAGEMENT CORPORATION: .... A Delaware corporation.	Directed Verdict; Not Guilty Indictment 11900 11910	Directed Verdict; Not Guilty Indictment 11908	No
FARRELL, JOHN T.: ..... Vice President and Director of Beneficial Management Corporation; supervisor of the Public Relations Department.	Guilty Indictment 11900 11910 11921	Guilty Indictment 11908	Yes

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
GARFINKLE, MORRIS: ..... Member, 1962, Small Loan Regulatory Board.	Guilty Indictment 11974 11923 (ct. 1) 11924 11925-11929 11930 (ct. 1) 11931 (ct. 1) 11932 (ct. 1) 11933 11935 (ct. 1) 11936 (ct.1) 11937 (ct. 1) Directed Verdict; Not Guilty Indictment 11931 (ct. 2) 11932 (ct. 2) Not Guilty Indictment 11923 (ct. 2) 11930 (ct. 2) 11935 (ct. 2) 11936 (ct. 2) 11937 (ct. 2)	No Indictment	No Died after trial.

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
GLYNN, FRANCIS T.: ..... Director of Public Relations for the Beneficial Finance "System" in the Massachusetts region. He was formerly an employee of Beneficial Management Company.*	Guilty Indictment 11966 11910 11900	Guilty Indictment 11908	Yes
GODSHALL, AUSTIN, R.: ..... Public Relations Representative for Family Finance Corporation.	Indicted 11900 11910 but not tried.	No Indictment	No

* Glynn was on the payroll of "Industrial Bankers," one of the three Massachusetts business trusts wholly owned by the Beneficial Finance Company. He received his orders, however, from Farrell, Vice President of Beneficial Management Company.

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
HANLEY, MARTIN J.: ..... Supervisor of Loan Agencies and Deputy Commissioner of Banks; Head of the Small Loans Division for the Commonwealth of Massachusetts.	Guilty Indictment 11974 11976 11977 11979 11980 (ct. 1) 11981 (ct. 1) 11983 (ct. 1) 11984 (ct. 1) 11985 (ct. 1) 11986 (ct. 1) 11987 (ct. 1) 11989-11992 Not Guilty Indictment 11983 (ct. 2) 11984 (ct. 2) 11985 (ct. 2) 11986 (ct. 2) 11987 (ct. 2) Directed Verdict; Not Guilty Indictment 11978 11980 (ct.2) 11981 (ct. 2)	Guilty Indictment 10272 10273 (cts. 2, 4) 10275-10282 10284 (ct. 2) 10286 (ct. 2) 11969-11971 (ct. 2 only) 11972 11993 (cts. 3, 4) Not Guilty, Indictment 10273 (cts. 1, 3) 10284 (ct. 1) 10286 (ct. 1) 11969-11971 (ct. 1 only) 11993 (cts. 1, 2)	Yes

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
HAUGAN, HAROLD, L.: Director of Public Relations, Vice President, Household Finance Corporation.	Indicted 11900 11910 but not tried.	No Indictment	No
HEATH, WILLIAM F.: Vice President, American Investment Company of Illinois (see also Public Finance Corporation; New England Regional Director of Public Relations.	No Indictment Witness for Commonwealth	Named in Indictment 11908 as a co-conspirator but not as a defendant; Witness for Commonwealth	No
HOUSEHOLD FINANCE CORPORATION: A Delaware corporation licensed to engage in the small loans business in this Commonwealth.	Guilty Indictment 11900 11910 11995	Guilty Indictment 11908	Yes
LERCH, MARLIN E.: Eastern Director for Public Relations, Household Finance Corporation.	No Indictment	Indicted 11908 but not tried.	No
LIBERTY LOAN CORPORATION: A Delaware corporation with an ownership interest in Massachusetts business trusts licensed to engage in the business of making small loans in this Commonwealth.	Guilty Indictment 11900 11910 11997	Directed Verdict; Not Guilty Indictment 11908	Yes

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
LOCAL FINANCE CORPORATION: A Rhode Island corporation which, according to its own brief, owned "almost entirely" seventeen Massachusetts business trusts licensed to engage in the business of making small loans in this Commonwealth; also owner of the Provident Management Company.	No Indictment	Guilty Indictment 11908 Directed Verdict; Not Guilty Indictment 11996	Yes
McDERMOTT, CHARLES JR.: President, Merchants Acceptance Corporation.	No Indictment	Named in Indictment 11908 as a co-conspirator but not as a defendant.	No
McHENRY, L. JOHN SR.: President, Local Finance Corporation.	Died October 28, 1962		
MAC MANAGEMENT CORPORATION: A Massachusetts corporation.	No Indictment	Named in Indictment 11908 as a co-conspirator but not as a defendant.	No
MERCHANTS ACCEPTANCE CORPORATION: A Massachusetts corporation.	No Indictment	Named in Indictment 11908 as a co-conspirator but not as a defendant.	No

NAME	FIRST TRIAL	SECOND TRIAL	APPEAL
NEWHALL, EDWARD R.: Frances T. Glynn's predecessor as Director for Public Relations, Beneficial Finance "System," for the Massachusetts region. (See the note included under Glynn's name as to the nature of this position.)	No Indictment	Guilty Indictment 11908	Yes
PAUL, DEWITT J.: Chairman of the Board, Beneficial Finance Company.	No Indictment	Directed Verdict; Not Guilty Indictment 11908	No
PRATT, JAMES S.: New England Regional, Public Relations Representative for Household Finance Corporation; successor to Engle.	Guilty Indictment 11900 11910 11998	Guilty Indictment 11908	Yes
PROVIDENT MANAGEMENT CORPORATION: A foreign corporation, registered to do business in this Commonwealth, wholly owned by Local Finance Corporation. Local Finance Corporation has substantially the same officers and shares the same address in Providence, Rhode Island, as Provident.	No Indictment	No Indictment	No

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
PUBLIC FINANCE CORPORATION: A California corporation, registered to do business in this Commonwealth; controlled by American Investment Company of Illinois; several licensed small loan agencies did business under its name in the Commonwealth.	No Indictment	Named in Indictment 11908 as a co-conspirator but not as a defendant.	No
REDFIELD, J. MILLER: Vice President, American Investment Company of Illinois; Heath's immediate supervisor.	No Indictment	Named in Indictment 11908 as a co-conspirator but not as a defendant.	No
SCHWARTZ, LOUIS: President and Trustee of Community Finance Company, a Massachusetts business trust licensed to carry on the business of making small loans in the Commonwealth. Schwartz has been described as the largest independent'' small loans licensee in the Commonwealth.	No Indictment	Named in Indictment 11908 as a co-conspirator but not as a defendant; Witness for Commonwealth.	No

NAME	*FIRST TRIAL*	*SECOND TRIAL*	*APPEAL*
STATE LOAN AND FINANCE CORPORATION: ..... A Delaware corporation licensed to engage in the business of making small loans in this Commonwealth.	Directed Verdict; Not Guilty Indictment 11900 11910	No Indictment	No
STATE LOAN AND FINANCE MANAGEMENT: ..... A Delaware corporation.	Directed Verdict; Not Guilty Indictment 11900 11910	No Indictment	No
THOMASCH, GORDON, J.: ..... Public Relations Representative for State Loan and Finance Corporation.	Directed Verdict; Not Guilty Indictment 11900 11910	No Indictment	No
WOODCOCK, LYLE S.: ..... Executive Vice President and Director of Liberty Loan Corporation.	Indictment 11900 11910 12032	Directed Verdict; Not Guilty Indictment 11908	Yes

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

November 4, 1971.

IN THE CASE OF

COMMONWEALTH

v.

BENEFICIAL FINANCE COMPANY & others

pending in the Superior Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.,—

All judgments affirmed.

BY THE COURT,

(s) WILLIAM M. CLORAN, ASS'T. CLERK.

November 4, 1971

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION:

See opinion on file.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, ss: SUPERIOR COURT
Nos. 11,896, etc. 5th CRIMINAL SESSION

COMMONWEALTH
v.
NATHANIEL W. BARBER, ET ALS

BEFORE: QUIRICO, J.
and a JURY

DECISIONS ON MOTIONS FILED BY THE COMMONWEALTH TO ADMIT EXHIBITS AND TESTIMONY AGAINST ADDITIONAL DEFENDANTS AND ON MOTIONS FOR PRELIMINARY FINDINGS OF CONSPIRACY

Room 906, Court House,
Boston, Massachusetts,
October 17, 1966

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK: SS
SUPERIOR COURT
INDICTMENTS NOS.
(SEE TEXT)

COMMONWEALTH
v.
NATHANIEL W. BARBER
ET ALS

PART ONE

Decision Of Court On Seven (7) Motions Filed By The Commonwealth To Admit Exhibits And Testimony Against Additional Defendants.

---

1. On October 6th and 7th, 1966, the Commonwealth filed seven (7) Motions asking that certain evidence previously admitted as to certain named defendants now be admitted as to certain additional defendants as to specified indictments. These Motions are listed by title at Page *4017* of the transcript of this case. Each Motion identifies the evidence now offered against additional defendants by Exhibit No., or by reference to the name of the witness and the pages where the testimony appears in the transcript. Certain portions of such evidence are now being offered in just one of the seven (7) Motions, while certain other portions are now being offered in each of two or more such Motions.

2. In acting upon these Motions, this Court has made a tabulation giving the following information as to the seven (7) Motions combined: (a) the Transcript page numbers in chronological order; (b) the reference to each Motion, and part thereof, in which the evidence is offered; (c) the defendants as to whom the evidence was originally admitted; (d) the defendants as to whom the evidence is now being offered; (e) the portions of such evidence which were offered in the Motions, but which were waived at the hearing; and (f) the action of this Court in either allowing or denying the evidence offered, showing such action separately as to each of the seven (7) Motions. By reason of such tabulation, it is not necessary in the text of this Decision to repeat the various transcript references involved, or the names of the defendants or indictments as to which the evidence was offered. All that, plus the action of the Court thereon is shown on the attached six (6)

page tabulation entitled: *"RECORD OF ACTION OF COURT ON SEVEN (7) MOTIONS FILED BY COMMONWEALTH TO MAKE EVIDENCE ORIGINALLY ADMITTED TO PARTICULAR DEFENDANTS APPLICABLE TO ADDITIONAL DEFENDANTS,"* which is incorporated herein by reference, and is made a part of this Decision. The decision of this Court on all of said Motions is as recorded on that tabulation.

3. No evidence heretofore admitted as to a particular defendant shall be considered as being admitted as to him for a second time by reason of the Court's action on said Motions, or by reason of any reading of such evidence to the jury as to other defendants. The action of this Court in admitting evidence as to additional defendants shall not affect any exceptions heretofore taken by defendants as to whom the evidence was previously admitted.

4. Notwithstanding the transcript page and line number references contained in the tabulation attached to this Decision, the present Order of this Court in admitting evidence from said transcript against additional defendants shall apply only to the parts thereof which consist of Exhibits, questions asked of witnesses, and of answers given by the witness; and it shall not apply to statements, objections, arguments, or exceptions by counsel, nor to statements or rulings by the Court, nor to the record of any bench or lobby conferences.

PART TWO

Decision Of Court On Three *(3)* Motions Filed By The Commonwealth For Preliminary Findings of Existence Of Certain Conspiracies.

1. Prior to the hearing on the seven (7) Motions described and decided in *PART ONE* above, the Commonwealth also filed three (3) additional Motions which may be described briefly as follows:

(a) One Motion asked the Court to make a prelim-

inary finding of the existence of the conspiracy alleged in Indictment No. *11,900* (to bribe Martin J. Hanley) but limited to the defendants Barber, Pratt, Farrell, Glynn, and Woodcock, and to the alleged co-conspirator Heath;

(b) One Motion asked the Court to make a preliminary finding of the existence of the conspiracy alleged in Indictment No. *11,910* (to bribe Morris Garfinkle) but limited to the defendants Barber, Pratt, Farrell, Glynn, and Woodcock, and to the alleged co-conspirator Heath;

(c) One Motion asked the Court to make a preliminary finding of the existence of the conspiracy alleged against the defendants Martin J. Hanley and Morris Garfinkle in Indictment No. *11,974* (to request and accept bribes from certain persons and corporations named therein).

These three (3) Motions have a bearing upon the other seven (7) Motions; and the decision on one group of Motions bears upon, and is related to the decision on the other group. The Court's decisions on the two groups of Motions may be considered as having been made simultaneously, notwithstanding the separation of the decision into two parts.

2. By these three Motions, the Commonwealth is in effect asking the Court to decide that the evidence introduced in the trial to this point is sufficient to permit certain evidence previously admitted as to one or a limited number of defendants to be admitted now as to one or more additional defendants. Whether the action by the Court in that regard constitutes the making of a "preliminary finding," as is requested in the Motions, or whether it constitutes the making of a ruling that the evidence is legally sufficient to warrant or permit such a finding, is not entirely clear from the decided cases. It may

be sufficient to consider the following excerpts from several decisions:

Commonwealth v. *Scott* (1877) 123 Mass. 222, 235, where the court said: "There being *evidence sufficient to be laid before the jury to prove the conspiracy,* as to which the presiding justice was in the first instance to determine..."

Commonwealth v. *Rogers* (1902) 181 Mass. 184, 193, where the court said: "The presiding judge rightly ruled that there was *sufficient evidence of a conspiracy* against all the defendants. It was proper to make the statement as the ground for admitting declarations of one as evidence against the others. Where a *preliminary finding of fact* is necessary on the part of the judge for such a purpose there is no duty to conceal it from the jury."

Commonwealth v. *McKenzie* (1912) 211 Mass. 578, 580, where the court said: "Before this testimony (of statements made by an alleged co-conspirator in the absence of the defendant) was introduced the prosecution had offered the defendant's testimony before the grand jury, which, presumably, satisfied the trial judge that *a prima facie case of unlawful conspiracy had been made out.*"

Commonwealth v. *Riches* (1914) 219 Mass. 433, 438, 439, where the Court said: "*Whether the evidence was sufficient to establish a prima facie case* at the close of Lemke's testimony, as the Chief Justice of the Superior Court found, is immaterial because we are satisfied that upon the whole evidence the jury were warranted in finding that a conspiracy existed between these defendants..."

Commonwealth v. *Benesch* (1935) 290 Mass. 125, 132-133, where the court said: "The case was tried in the manner in which conspiracy cases are customarily tried, by allowing in the first instance as against each defendant separately evidence of such acts, knowledge and admissions as appear to affect the particular defendant and then, when *sufficient evidence has accumulated to support a fair inference of the existence of a conspiracy*, by removing the limitation, so that evidence of the acts, knowledge and admissions of all who are found to have joined in the conspiracy, during the course of and in pursuance of the conspiracy, becomes applicable against all the conspirators." (Foregoing quoted in *Commonwealth* v. *Kiernan*, (1964) 348 Mass. 29, 57, footnote.)

Runnels v. *Lowell Sun Co.* (1945) 318 Mass. 466, 472, where the court said: "This (statement by one alleged co-conspirator in the absence of the other) was hearsay and was admissible only if a conspiracy existed between Smith and Reynolds and Smith's statements were made during the course of the conspiracy. . . *Whether such a conspiracy existed was a preliminary question of fact to be determined by the trial judge*. . . whose decision is conclusive unless the record shows error of law in reference to the preliminary inquiry."

(All emphasis supplied.)

It is probably not sufficiently important to the ultimate result for this Court to dwell further on whether its action on the three Motions in question amounts to a finding of facts, or to a ruling as to the sufficiency of evidence to warrant or permit a finding of facts. The distinction may be legally nice and intriguing, but it does not warrant further discussion at this point. If this Court were required

to make a choice, it would conclude that the proper course of action is to make a ruling as to whether the evidence to this point in the trial is legally sufficient to warrant or permit a finding of a conspiracy, or, stated differently, a ruling as to whether the evidence to this point in the trial is legally sufficient to make out a prima facie case of conspiracy.

3. After hearing on the three Motions for preliminary findings of conspiracies, and upon consideration of all of the evidence, and the inferences which may lawfully be drawn therefrom, and of the applicable legal principles, the decision of this Court thereon is as follows:

(a) *Indictment No. 11,900:* The evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient: (i) to warrant or permit a finding of the existence of a conspiracy as charged in this Indictment, as to the defendants Barber, Pratt, Farrell, Glynn, and Woodcock, and the co-conspirator Heath; and (ii) to make out a prima facie case of the existence of such conspiracy as to such six (6) persons.

(b) *Indictment No. 11,910:* The evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient: (i) to warrant or permit a finding of the existence of a conspiracy as charged in this Indictment as to the defendants Barber, Pratt, Farrell, Glynn, and Woodcock, and the co-conspirator Heath; and (ii) to make out a prima facie case of the existence of such conspiracy as to such six (6) persons. The evidence, with inferences which may lawfully be drawn therefrom, is also legally sufficient: (i) to warrant or permit a finding that in addition to such six (6) persons above named, Martin J. Hanley was also

a party to said conspiracy alleged in Indictment No. 11,910; and (ii) to make out a prima facie case of the existence of such conspiracy with said Hanley and the six (6) persons named above as the conspirators.

(c) *Indictment No. 11,974:* The evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient: (i) to warrant or permit a finding of the existence of a conspiracy as charged in this Indictment as to the defendants Hanley and Garfinkle; and (ii) to make out a prima facie case of the existence of such conspiracy as to such defendants.

4. If, instead of making a ruling as to the legal sufficiency of the evidence to warrant or permit a finding of the existence of a conspiracy, or its legal sufficiency to make out a prima facie case of the existence of a conspiracy, the Court is required to make a preliminary finding as to whether or not such a conspiracy existed, then this Court hereby makes the following preliminary findings:

(a) *Indictment No. 11,900:* The Court finds that a conspiracy as charged in this Indictment existed as to the defendants Barber, Pratt, Farrell, Glynn, and Woodcock, and the co-conspirator Heath;

(b) *Indictment No. 11,910:* The Court finds that a conspiracy as charged in this Indictment existed as to the defendants Barber, Pratt, Farrell, Glynn, and Woodcock, as to the co-conspirator Heath who is named in the Indictment, and also as to Martin J. Hanley who is not named in the Indictment; and

(c) *Indictment No. 11,974:* The Court finds that a conspiracy as charged in this Indictment existed as to the defendants Hanley and Garfinkle.

5. Nothing contained in the preceding paragraphs of *PART TWO* of this Decision shall constitute or operate as

a ruling, finding, or decision as to whether any persons or corporations other than those named above did or did not become parties to any of the conspiracies charged in Indictments Nos. *11,900*, *11,910*, and *11,974*.

PART THREE

Decision As To Principal-Agent Relationship

1. The defendants properly contend that under the decision in *Commonwealth* v. *Stasiun*, Mass. A.S. (1965) 605, mere proof that a person conspired to commit a substantive offense is not *per se* sufficient to convict that same person on a charge of having committed the substantive offense. The Commonwealth, while admitting that to be the law, in moving that certain evidence originally admitted against one or several defendants, but not all defendants, now be admitted as to additional defendants, seems to base its request in part on the contention that in deciding the guilt or innocence of the defendants on the indictments charging substantive crimes, they may be charged as principals for acts, conduct, or words of their agents. The individual defendants dispute the possibility of guilt on such charges based on acts, conduct, or words of anyone other than the particular individual charged. It is sufficient for the purposes of this Decision to invite attention to the following decisions of this Commonwealth:

Dolan v. *Commonwealth* (1939), 304 Mass. 325, 339.

Commonwealth v. *Albert* (1940), 307 Mass. 239, 243.

Commonwealth v. *Connolly* (1941), 308 Mass. 481, 489.

Commonwealth v. *Mannos* (1942), 311 Mass. 94, 108, 110.

Commonwealth v. *Stasiun*, Mass. A.S. (1965) 605, 613-615.

2. To the extent that the admissibility of evidence of the actions, conduct, and words of one person may depend upon the existence of a principal-agent relationship, this Court decides and concludes as follows:

(a) *Indictments Nos. 11,896, 11,921, 11,966, 11,998 and 12,032:* As to these indictments, the evidence with inferences which may lawfully be drawn therefrom is legally sufficient to warrant or permit a finding that the defendant named in each such indictment authorized the following persons to act for him and in his behalf in taking any action and doing any act which they thought necessary for the purpose of corruptly giving, offering and promising gifts and gratuities in the manner, with the intent, for the purpose, and to the persons alleged in said indictments:

i. William F. Heath; and

ii. Each of the other defendants named in any of the above-numbered Indictments.

(b) *Indictments Nos. 11,924, 11,925, 11,926, 11,927, 11,928, 11,929, 11,933, and 11,935:* As to these Indictments, the evidence with inferences which may lawfully be drawn therefrom is legally sufficient to warrant or permit a finding that the defendant Morris Garfinkle authorized Martin J. Hanley to act for him and in his behalf in taking any action and doing any act which said Hanley thought necessary for the purpose of corruptly requesting and accepting gifts and gratuities in the manner, with the intent, for the purpose, and from the persons alleged in said Indictments.

(c) *Indictments Nos. 11,976, 11,977, 11,979, 11,987, 11,989, 11,990, 11,991, and 11,992:* As to these Indictments, the evidence with inferences which may lawfully be drawn therefrom is legally sufficient to warrant or permit a finding that the defendant Martin J. Hanley authorized Francis T. Glynn and William F. Heath to act for him and in his behalf in taking any action and doing any act which said Glynn and Heath

thought necessary for the purpose of corruptly requesting gifts and gratuities for said Hanley, in the manner, with the intent, for the purpose, and from the persons alleged in said Indictments.

ENTERED:

October 17, 1966.

FRANCIS J. QUIRICO
Justice of the
Superior Court

RECORD OF ACTION OF COURT ON SEVEN (7) MOTIONS FILED BY COMMONWEALTH TO MAKE EVIDENCE ORIGINALLY ADMITTED TO PARTICULAR DEFENDANTS APPLICABLE TO ADDITIONAL DEFENDANTS.

LEGEND:
A = Allowed as to all defendants listed.
D = Denied.
Wvd = Waived as to these Counts or Indictments.
— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References FROM PAGE	FROM LINE	THROUGH PAGE	THROUGH LINE	ORIGINAL LIMITS	PRESENT MOTION REFERENCE
2427	12	2428	4	Garfinkle	Count 1: 5-B-5
2428	(Included in above)			Garfinkle	2-B-4 2-B-5 Count 1: 5-B-4
2466	1	2467	10	Hanley	2-B-1 Count 1: 5 B-1

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.)	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.)
							11976
							11977
							11979
				11896	11896	11924	11987
				11921	11921	thru	11989
OFFERED *US.*				11966	11966	11929	11990
ADDITIONAL				11998	11998	11933	11991
DEFENDANTS	11900	11910	11974	12032	12032	11935	11992
Farrell	—	—	—	A	—	—	—
Glynn							
Barber							
Pratt							
Woodcock							
Same as above	A	—	—	A	—	—	—
Same as above	A	—	—	A	—	—	—

LEGEND:
A = Allowed as to all defendants listed.

D = Denied.

Wvd = Waived as to these Counts or Indictments.

— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References				ORIGINAL LIMITS	PRESENT MOTION REFERENCE
FROM		THROUGH			
PAGE	LINE	PAGE	LINE		
2467	11	2467	19	Hanley	2-B-2 Count 1: 5-B-2
2467	20	2467	End	Hanley	2-B-3 Count 1: 5-B-3
2633	Top	2650	12	Hanley Garfinkle Ben.F.Co.	2-A-1 3-B-1 Count 1: 5-A-1 Count 2: 5-B-1
(2650)	Ex. 155			Garfinkle	2-A-2 Count 1: 5-A-2

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
OFFERED *vs.* ADDITIONAL DEFENDANTS	Conspiracy to Bribe Hanley 11900	Conspiracy to Bribe Garfinkle 11910	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe 11974	Count 1 Bribe to Hanley 11896 11921 11966 11998 12032	Count 2 Bribe to Garfinkle 11896 11921 11966 11998 12032	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.) 11924 thru 11929 11933 11935	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.) 11976 11977 11979 11987 11989 11990 11991 11992
Same as above	A	—	—	A	—	—	—
Same as above	A	—	—	A	—	—	—
Same as above	A	A	—	A	A	—	—
Same as above	A	—	—	A	—	—	—

LEGEND:
A = Allowed as to all defendants listed.

D = Denied.

Wvd = Waived as to these Counts or Indictments.

– = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References					
FROM		THROUGH		ORIGINAL LIMITS	PRESENT MOTION REFERENCE
PAGE	LINE	PAGE	LINE		
(2653)	Ex. 157			Hanley	2-A-3 Count 1: 5-A-3 Duffy: 6: 1)
(2660)	Ex. 159			Hanley Garfinkle	2-A-4 3-B-2 Count 1: 5-A-4 Count 2: 5-B-2
3020		3021		Hanley	3-C-1 Count 1: 5-D-1 Count 2: 5-C-1

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935; R. & A. Bribe Others; R. Bribe (Garfinkle; Defs.)	11937 R. & A. Bribe Others; R. Bribe (Hanley; Defs.)
OFFERED *VS.* ADDITIONAL DEFENDANTS	11900	11910	11974	11896 11921 11966 11998 12032	11896 11921 11966 11998 12032	11924 thru 11929 11933 11935	11976 11977 11979 11987 11989 11990 11991 11992
Farrell	A	—	—	A	—	A	—
Glynn							
Barber							
Pratt							
Woodcock							
Garfinkle							
Farrell	A	A	—	A	A	—	—
Glynn							
Barber							
Pratt							
Woodcock							
WAIVED	—	Wvd	—	Wvd	Wvd	—	—

LEGEND:
A = Allowed as to all defendants listed.

D = Denied.

Wvd = Waived as to these Counts or Indictments.

– = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References					
FROM		THROUGH		ORIGINAL LIMITS	PRESENT MOTION REFERENCE
PAGE	LINE	PAGE	LINE		
3020	Top	3021	13	Garfinkle	Count 1: 5-D-4
3021	14	3023	23	Garfinkle	Count 1: 5-D-4
3023					
SEE INSTEAD:					
3027	21	3028	3	Hanley	Count 1: 5-D-6
3027		3031			
SEE INSTEAD:					
3029	11	3031	8	Garfinkle Hanley	Count 1: 5-D-5
3035	3	3041	21	Glynn Garfinkle Hanley	3-C-2 Count 1: 5-D-2 Count 2: 5-C-2

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.)	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.)
							11976
							11977
							11979
				11896	11896	11924	11987
				11921	11921	thru	11989
OFFERED *US.* ADDITIONAL				11966	11966	11929	11990
				11998	11998	11933	11991
DEFENDANTS	11900	11910	11974	12032	12032	11935	11992
WAIVED	—	—	—	Wvd	—	—	—
Farrell Glynn Barber Pratt Woodcock	—	—	—	Wvd	—	—	—
Same as above	—	—	—	Wvd	—	—	—
Same as above	—	—	—	Wvd	—	—	—
Farrell Barber Pratt Woodcock	—	A	—	Wvd	Wvd	—	—

LEGEND:
A = Allowed as to all defendants listed.

D = Denied.

Wrd = Waived as to these Counts or Indictments.

— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References FROM PAGE	LINE	THROUGH PAGE	LINE	ORIGINAL LIMITS	PRESENT MOTION REFERENCE
3043	3	3047	22	Garfinkle	Count 1: 5-D-7
3048		3075			
Changed by Travers to:					
3048 and 3066	12 4	3050 3075	11)) 4)	Glynn Hanley	3-C-3 Count 1: 5-D-3 Count 2: 5-C-3
3079	Top	(3080 (Not included by Travers)	14)	Hanley	Count 1: 5-D-8

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.)	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.)
							11976
							11977
							11979
				11896	11896	11924	11987
				11921	11921	thru	11989
OFFERED *VS.*				11966	11966	11929	11990
ADDITIONAL				11998	11998	11933	11991
DEFENDANTS	11900	11910	11974	12032	12032	11935	11992
Farrell	—	—	—	Wvd	—	—	—
Glynn							
Barber							
Pratt							
Woodcock							
Farrell	—	A	—	Wvd	Wvd	—	—
Barber							
Pratt							
Woodcock							
Farrell	—	—	—	Wvd	—	—	—
Glynn							
Barber							
Pratt							
Woodcock							

LEGEND:
A = Allowed as to all defendants listed.

D = Denied.

Wvd = Waived as to these Counts or Indictments.

— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References				ORIGINAL LIMITS	PRESENT MOTION REFERENCE
FROM		THROUGH			
PAGE	LINE	PAGE	LINE		
3081	4	3082	13	Hanley	Count 1: 5-D-9
(3563	Top	3577	10	Pratt	7-a)
(3581	12	3582	15	Glynn	
3743	18	3748	14	Farrell	6-a)
				Glynn	7-b)
				Barber	
				Pratt	
				Woodcock	
3843	21	3845	End	Glynn	1-A-1 Count 1: 5-C-1
3849	8	3851	17	Hanley	1-A-2 Count 1: 5-C-2

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
OFFERED *VS.* ADDITIONAL DEFENDANTS	Conspiracy to Bribe Hanley 11900	Conspiracy to Bribe Garfinkle 11910	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe 11974	Count 1 Bribe to Hanley 11896 11921 11966 11998 12032	Count 2 Bribe to Garfinkle 11896 11921 11966 11998 12032	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.) 11924 thru 11929 11933 11935	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.) 11976 11977 11979 11987 11989 11990 11991 11992
Same as above	—	—	—	Wvd	—	—	—
Hanley	—	—	—	—	—	—	D
Garfinkle Hanley	—	—	—	—	—	D	A
WAIVED	Wvd	—	—	Wvd	—	—	—
Farrell Glynn Barber Pratt Woodcock	A	—	—	A	—	—	—

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D = Denied.

Wvd = Waived as to these Counts or Indictments.

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MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References					
FROM		THROUGH		ORIGINAL LIMITS	PRESENT MOTION REFERENCE
PAGE	LINE	PAGE	LINE		
3851	18	3854	22	Glynn Hanley	1-A-3 Count 1: 5-C-3
(Note: Court fixed starting point)					
3855	9	3857	13	Glynn Pratt	1-A-4 Count 1: 5-C-4
3859	12	3862	15	Glynn	3-A-1 Count 2: 5-A-1
3862	16	3864	5	Glynn	3-A-2 Count 2: 5-A-2

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
OFFERED *vs.* ADDITIONAL DEFENDANTS	Conspiracy to Bribe Hanley 11900	Conspiracy to Bribe Garfinkle 11910	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe 11974	Count 1 Bribe to Hanley 11896 11921 11966 11998 12032	Count 2 Bribe to Garfinkle 11896 11921 11966 11998 12032	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.) 11924 thru 11929 11933 11935	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.) 11976 11977 11979 11987 11989 11990 11991 11992
Farrell Barber Pratt Woodcock	A	—	—	A	—	—	—
Farrell Barber Woodcock	A	—	—	A	—	—	—
Farrell Barber Pratt Woodcock	—	A	—	—	Wvd	—	—
Same as above	—	A	—	—	Wvd	—	—

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D = Denied.

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MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References FROM PAGE	FROM LINE	THROUGH PAGE	THROUGH LINE	ORIGINAL LIMITS	PRESENT MOTION REFERENCE
3866	Top	3869	21	Glynn Hanley	1-A-5 3-A-3 Count 1: 5-C-5 Count 2: 5-A-3
3875	9	3891	8	Hanley Garfinkle	1-A-6 3-A-4 Count 1: 5-C-6 Count 2: 5-A-4

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.)	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.)
							11976
							11977
							11979
				11896	11896	11924	11987
				11921	11921	thru	11989
OFFERED *vs.*				11966	11966	11929	11990
ADDITIONAL				11998	11998	11933	11991
DEFENDANTS	11900	11910	11974	12032	12032	11935	11992
Same as above	A	A	—	A	Wvd	—	—
Farrell	A	A	—	A	A	—	—
Glynn							
Barber							
Pratt							
Woodcock							

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MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References				ORIGINAL LIMITS	PRESENT MOTION REFERENCE
FROM		THROUGH			
PAGE	LINE	PAGE	LINE		
3894	4	3895	End	Hanley	1-A-7 3-A-5 4-A-1 Count 1: 5-C-7 Count 2: 5-A-5 6-b
3896	15	3898	19	Hanley	1-A-8 3-A-6 4-A-2 Count 1: 5-C-8 Count 2: 5-A-6 6-c

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.)	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.)
							11976
							11977
							11979
				11896	11896	11924	11987
				11921	11921	thru	11989
OFFERED *VS.* ADDITIONAL				11966	11966	11929	11990
				11998	11998	11933	11991
DEFENDANTS	11900	11910	11974	12032	12032	11935	11992
Farrell	A	A	A	A	A	A	—
Glynn							
Barber							
Pratt							
Woodcock							
Garfinkle							
Farrell	A	A	A	A	A	A	—
Glynn							
Barber							
Pratt							
Woodcock							
Garfinkle							

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— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References				ORIGINAL LIMITS	PRESENT MOTION REFERENCE
FROM		THROUGH			
PAGE	LINE	PAGE	LINE		
(3900	2	3901	14	Hanley	1-A-9
(3916	1	3916	5		3-A-7
					4-A-3
					Count 1:
					5-C-9
					Count 2:
					5-A-7
					6-d
3907	10	3909	16	Barber	1-A-10
					Count 1:
					5-C-10
3909	17	3910	3	Barber	1-A-11
					Count 1:
					5-C-11

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.)	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.)
							11976
							11977
							11979
				11896	11896	11924	11987
				11921	11921	thru	11989
OFFERED *VS.*				11966	11966	11929	11990
ADDITIONAL				11998	11998	11933	11991
DEFENDANTS	11900	11910	11974	12032	12032	11935	11992
Same as above	A	A	A	A	A	A	—
Farrell	A	—	—	A	—	—	—
Glynn							
Pratt							
Woodcock							
Same as above	A	—	—	A	—	—	—

LEGEND:
A = Allowed as to all defendants listed.

D = Denied.

Wvd = Waived as to these Counts or Indictments.

— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References				ORIGINAL LIMITS	PRESENT MOTION REFERENCE
FROM		THROUGH			
PAGE	LINE	PAGE	LINE		
3907	10	3912	17	Barber	3-A-8 Count 2: 5-A-8
(Note: Includes all which is in two preceding items.)					
3912	18	3913	9	Barber	1-A-12 3-A-9 Count 1: 5-C-12 Count 2: 5-A-9
3913	10	3914	5	Glynn	1-A-13 3-A-10 Count 1: 5-C-13

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
OFFERED *VS.* ADDITIONAL DEFENDANTS	Conspiracy to Bribe Hanley 11900	Conspiracy to Bribe Garfinkle 11910	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe 11974	Count 1 Bribe to Hanley 11896 11921 11966 11998 12032	Count 2 Bribe to Garfinkle 11896 11921 11966 11998 12032	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.) 11924 thru 11933 11935	11937 R. & A. Bribe Others: R. Bribe (Hanley: Deft.) 11976 11977 11979 11987 11989 11990 11991 11992
Same as above	—	A	—	—	A	—	—
Same as above	A	A	—	Wvd	A	—	—
Farrell Barber Pratt Woodcock	A	A	—	Wvd	A	—	—

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Wvd = Waived as to these Counts or Indictments.

— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References				ORIGINAL LIMITS	PRESENT MOTION REFERENCE
FROM		THROUGH			
PAGE	LINE	PAGE	LINE		
3914	6	3914	14	Glynn	1-A-14 3-A-11 4-A-4 Count 1: 5-C-14 Count 2: 5-A-11 6-e
3917	Top	3918	13	Glynn	1-A-15 3-A-12 Count 1: 5-C-15 Count 2: 5-A-12

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.)	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.)
							11976
							11977
							11979
				11896	11896	11924	11987
				11921	11921	thru	11989
OFFERED *vs.*				11966	11966	11929	11990
ADDITIONAL				11998	11998	11933	11991
DEFENDANTS	11900	11910	11974	12032	12032	11935	11992
Farrell	A	A	A	A	A	A	—
Barber							
Pratt							
Woodcock							
Garfinkle							
Farrell	A	A	—	Wvd	A	—	—
Barber							
Pratt							
Woodcock							

LEGEND:
A = Allowed as to all defendants listed.

D = Denied.

Wvd = Waived as to these Counts or Indictments.

— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References					
FROM		THROUGH		ORIGINAL LIMITS	PRESENT MOTION REFERENCE
PAGE	LINE	PAGE	LINE		
3918	14	3920	13	Glynn	1-A-16 3-A-13 Count 1: 5-C-16 Count 2: 5-A-13
3920	14	3922	22	Glynn	1-A-17 Count 1: 5-C-17
(3922 (3928	23 11	3923 3929	22 7	Glynn	1-A-18 3-A-14 Count 1: 5-C-18 Count 2: 5-A-14

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
OFFERED *VS.* ADDITIONAL DEFENDANTS	Conspiracy to Bribe Hanley 11900	Conspiracy to Bribe Garfinkle 11910	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe 11974	Count 1 Bribe to Hanley 11896 11921 11966 11998 12032	Count 2 Bribe to Garfinkle 11896 11921 11966 11998 12032	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.) 11924 thru 11929 11933 11935	11987 R. & A. Bribe Others: R. Bribe (Hanley: Deft.) 11976 11977 11979 11987 11989 11990 11991 11992
Same as above	A	A	—	Wvd	A	—	—
Same as above	A	—	—	A	—	—	—
Same as above	A	A	—	A	A	—	—

LEGEND:
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D = Denied.

Wvd = Waived as to these Counts or Indictments.

— = Not offered as to these Counts or Indictments.

MOTION NUMBERS:
(See: Tr., Page before #4017.)

Transcript References				ORIGINAL LIMITS	PRESENT MOTION REFERENCE
FROM		THROUGH			
PAGE	LINE	PAGE	LINE		
3929	8	3931	4	Glynn	1-A-19 3-A-15 Count 1: 5-C-19 Count 2: 5-A-15

	1., 2.	3.	4.	5.(1)	5.(2)	6.	7.
	Conspiracy to Bribe Hanley	Conspiracy to Bribe Garfinkle	Conspiracy by Hanley and Garfinkle to Request and Accept Bribe	Count 1 Bribe to Hanley	Count 2 Bribe to Garfinkle	11935: R. & A. Bribe Others: R. Bribe (Garfinkle: Deft.)	11937 R. & A. Bribe Others: R. Bribe (Hanley: Deft.)
							11976
							11977
							11979
				11896	11896	11924	11987
				11921	11921	thru	11989
OFFERED *US.*				11966	11966	11929	11990
ADDITIONAL				11998	11998	11930	11991
DEFENDANTS	11900	11910	11974	12032	12032	11935	11992
WAIVED	Wvd	Wvd	—	Wvd	Wvd	—	—

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK: SS

SUPERIOR COURT
Indictments Nos.
(See Text)

COMMONWEALTH

v.

HOUSEHOLD FINANCE CORPORATION
BENEFICIAL FINANCE CO.
LIBERTY LOAN CORPORATION

DECISION OF COURT ON TWO MOTIONS OF COMMONWEALTH FOR PRELIMINARY FINDING OF CONSPIRACY, AND ON THREE MOTIONS OF COMMONWEALTH TO ADMIT CERTAIN EXHIBITS AND TESTIMONY AGAINST ADDITIONAL DEFENDANTS.

PART ONE.

INTRODUCTION

1. On October 25, 1966, the Commonwealth filed five Motions which this Court described as follows on Page 4901 of the Transcript, giving numbers thereto for purposes of identification during the hearings:

#1. Motion for Preliminary Finding of Conspiracy under Indictment No. *11,900*;

#2. Motion for Preliminary Finding of Conspiracy under Indictment No. *11,910*;

#3. Motion to Admit Exhibits and Testimony against Defendants Beneficial Finance Co., Household Finance Corporation, and Liberty Loan Corporation under Indictment No. *11,900*;

#4. Motion to Admit Exhibits and Testimony against Defendants Beneficial Finance Co., Household Finance Corporation, and Liberty Loan Corporation under Indictment No. *11,910*; and

#5. Motion to Admit Exhibits and Testimony against Defendants Beneficial Finance Co., Household Finance Corporation, and Liberty Loan Corporation under Indictments Nos. *11,901, 11,995,* and *11,997.*

2. The indictments covered by the five Motions under consideration are the following:

(a) Indictment No. *11,900* charges that eight individuals and eight corporations, including *Beneficial Finance Co., Household Finance Corporation,* and *Liberty Loan Corporation* (hereinafter called *Beneficial, Household,* and *Liberty*), conspired corruptly to give, offer and promise a bribe to Martin J. Hanley, a public official. Two additional persons and two additional corporations are named as co-conspirators, but not as defendants.

(b) Indictment No. *11,910* is identical to *11,900* as to defendants, co-conspirators, and crime charged, except that it refers to Morris Garfinkle as the public official.

(c) Indictment No. *11,901* charges in Count 1 that *Beneficial* corruptly gave, offered and promised a bribe to Martin J. Hanley; and in Count 2 that it did the same to Morris Garfinkle.

(d) Indictment No. *11,995* charges in Count 1 that *Household* corruptly gave, offered and promised a bribe to Martin J. Hanley, and in Count 2 that it did the same to Morris Garfinkle.

(e) Indictment No. *11,997* charges in Count 1 that *Liberty* corruptly gave, offered and promised a bribe to Martin J. Hanley, and in Count 2 that it did the same to Morris Garfinkle.

3. As to each of the indictments *11,900* and *11,910* the Commonwealth now asks that this Court make a preliminary finding that the evidence at this point in the trial is

legally sufficient to permit a finding that the defendants *Household, Beneficial,* and *Liberty* participated in the conspiracy charged therein with certain persons as to whom this Court made a similar preliminary decision on October 17, 1966.

4. As to all of the indictments covered by these five Motions, certain evidence, including both exhibits and testimony, has heretofore been offered and admitted as to defendants other than *Household, Beneficial,* or *Liberty.* By Motions #3, #4, and #5, described above, the Commonwealth now asks that certain parts of such previously limited evidence which are identified in the Motions be admitted as to one, two, or the three of such corporations on indictments as specified in the Motions.

5. In making its decision on these five Motions, this Court divides them into two groups; and it states its decision as to each group separately. Notwithstanding such separate treatment and decision, the decision as to each group bears upon, and is related to, the decision on the other group. The Court's decision on the two groups may be considered as being made simultaneously, notwithstanding the separation of the Motions into two groups, and notwithstanding the sequence in which the two groups are treated in this decision.

Part Two

Decision On Two Motions Filed By The Commonwealth For Preliminary Findings Of Participation In Conspiracies.

1. On October 17, 1966, this Court filed a written decision to the effect that as to each of Indictments Nos. *11,900* and *11,910* "the evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient: (i) to warrant or permit a finding of the existence of a conspiracy as charged in this Indictment, as to the defendants Barber, Pratt, Farrell, Glynn and Woodcock, and the co-con-

spirator Heath; and (ii) to make out a prima facie case of the existence of such conspiracy as to such six (6) persons." That same decision also stated that such evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient: "(i) to warrant or permit a finding that in addition to such six (6) persons above named, Martin J. Hanley was also a party to said conspiracy alleged in Indictment No. 11,910; and (ii) to make out a prima facie case of the existence of such conspiracy with said Hanley and the six (6) persons named above as the conspirators.

2. By Motions #1 and #2 the Commonwealth, in effect, asks that this Court now make similar additional findings or rulings as to the participation of *Household*, *Beneficial*, and *Liberty* in the conspiracy charged in each of Indictments Nos. *11,900* and *11,910*.

3. In *PART TWO, Par. 2., pages iv, v, and vi* of its decision of October 17, 1966, this Court cited cases, with quotations therefrom, bearing upon the nature of the action required by the Court on such a Motion, with particular attention to whether it is a finding or ruling. All counsel have received copies of that decision, and it is sufficient to incorporate that legal discussion into this present decision by reference, without repetition.

4. There has been evidence at this trial of the statements, action and conduct of the individual defendants Farrell, Glynn, Barber, Pratt, and Woodcock in relation to the conspiracies and substantive crimes alleged in Indictments Nos. *11,900*, *11,901*, *11,910*, *11,995*, and *11,997*. There has also been evidence that at the time of all such statements, action and conduct these five individuals were employees of certain corporations; that some of them were officers of such corporations; and that all of them had certain duties and responsibilities, and performed certain services for such corporations. The rela-

tionship disclosed by the evidence, whether it be of agency, employment, or office holding, or a combination of them, existed between individuals and corporations as follows: between the individuals Barber and Pratt and the corporation *Household;* between the individuals Farrell and Glynn and wholly owned subsidiaries of the corporation *Beneficial,* and between such subsidiaries and *Beneficial*; and between the individual Woodcock and the corporation *Liberty.* This Court makes no attempt to recite or summarize all of the evidence on such status or relationship, or on the scope of the authority which each individual had to act for and thereby bind a given corporation. However, this Court does rule that the evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient to warrant or permit findings to the effect that:

(a) The statements, acts and conduct of the individual defendants Pratt and Barber in relation to each of the conspiracies and substantive crimes alleged in Indictments Nos. *11,900, 11,910,* and *11,995,* were done and performed by them for and in behalf of Household, within the scope of their authority to act for and in behalf of *Household,* and were otherwise in all respects such that they were and constituted the statements, acts and conduct of *Household,* for which Household can be held criminally responsible equally with such individuals;

(b) The statements, acts and conduct of the individual defendants Farrell and Glynn, and of Beneficial Management Corporation by or through its officers, agents, or employees, in relation to each of the conspiracies and substantive crimes alleged in Indictments Nos. *11,900, 11,901,* and *11,910* were done and performed by them for and in behalf of the defendant *Beneficial,* within the scope of their authority to act for

and in behalf of *Beneficial,* and were otherwise in all respects such that they were and constituted the statements, acts and conduct of *Beneficial,* for which *Beneficial* can be held criminally responsible equally with such individuals; and

(c) The statements, acts and conduct of the individual defendant Woodcock in relation to each of the conspiracies and substantive crimes alleged in Indictments Nos. *11,900, 11,910,* and *11,997* were done and performed by him for and in behalf of *Liberty,* within the scope of his authority to act for and in behalf of *Liberty,* and were otherwise in all respects such that they were and constituted the statements, acts and conduct of *Liberty,* for which *Liberty* can be held criminally responsible equally with such individual.

On the basis of the foregoing, certain evidence relating to the statements, acts and conduct of the individuals Pratt and Barber, heretofore limited so that it was not applicable to *Household,* is hereinafter ordered admitted as to *Household;* certain evidence relating to the statements, acts and conduct of the individuals Farrell and Glynn, heretofore limited so that it was not applicable to *Beneficial,* is hereinafter ordered admitted as to *Beneficial;* and certain evidence relating to the statements, acts and conduct of the individual Woodcock, heretofore limited so that it was not applicable to Liberty, is hereinafter ordered admitted as to *Liberty.*

5. As to each of the Indictments Nos. *11,900,* and *11,910,* this Court rules that the evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient:

(a) To warrant or permit a finding that the conspiracies charged therein existed; and that *Beneficial, Household,* and *Liberty* were parties thereto in addition to the following persons:

(i) Farrell, Glynn, Barber, Pratt, Woodcock, and Heath as to Indictment No. *11,900*; and

(ii) Farrell, Glynn, Barber, Pratt, Woodcock, Heath, and Hanley as to Indictment No. *11,910*.

(b) To make out a prima facie case of the existence of each such conspiracy as to the corporations and individuals named above.

6. If, instead of making a ruling as to the legal sufficiency of the evidence to warrant or permit a finding of the existence of a conspiracy, or its legal sufficiency to make out a prima facie case of the existence of a conspiracy, the Court is required to make a preliminary finding as to whether or not such a conspiracy existed then, as to both Indictments Nos. *11,900* and *11,910*, this Court makes a preliminary finding that the conspiracy as charged in each such Indictment existed as to the defendants *Beneficial Finance Co., Household Finance Corporation,* and *Liberty Loan Corporation,* with each other, and with the additional parties named by this Court in a similar preliminary finding of this Court on October 17, 1966.

Part Three

Decision Of Court On Three Motions Filed By The Commonwealth To Admit Exhibits And Testimony Against Additional Defendants.

1. On October 25, 1966, the Commonwealth filed three separate Motions, each of which was entitled: *"MOTION TO ADMIT EXHIBITS AND TESTIMONY AGAINST DEFENDANTS BENEFICIAL FINANCE CO., HOUSEHOLD FINANCE CORPORATION AND LIBERTY LOAN CORPORATION."* The Motions are distinguishable by the different Indictment numbers to which they apply. Each Motion is arranged in parts identified by a capital letter "A", "B" or "C", followed by the identity of the witness whose testimony is involved; and each such part is further broken down by item numbers making

specific reference to Transcript page and line numbers, or to Exhibit numbers. By each such item the Commonwealth identifies evidence previously limited to certain defendants, and now offers such evidence against one, two or all three of the corporations named in the title of the Motions. Each such item is offered now against the one or two corporations named as to such item; and if no corporation is so named, the item is offered against all three corporations. The Court is recording its decision and Order as to each Motion separately in following paragraphs hereof. Unless otherwise indicated, the Court's use of the word *"ALLOWED"* or *"DENIED"* means that the Court has made such decision as to all of the particular numbered item or items, and as to all corporations against which the evidence is now offered.

2. No evidence heretofore admitted as to a particular defendant shall be considered as being admitted as to him for a second time by reason of the Court's action on said Motions, or by reason of any reading of such evidence to the jury as to other defendants. The action of this Court in admitting evidence as to additional defendants shall not affect any exceptions heretofore taken by defendants as to whom the evidence was previously admitted.

3. Notwithstanding the transcript page and line number references contained in the tabulation attached to this Decision, the present Order of this Court in admitting evidence from said transcript against additional defendants shall apply only to the parts thereof which consist of Exhibits, questions asked of witnesses, and of answers given by the witness; and it shall not apply to statements, objections, arguments, or exceptions by counsel, not to statements or rulings by the Court, nor to the record of any bench or lobby conferences.

4. The action of this Court on the Motion relating to Indictment No. 11,900, is as follows:

ITEM NO.	*ACTION BY THE COURT*
	"A. Testimony of William F. Heath:"
1.	ALLOWED.
2.	ALLOWED.
3.	ALLOWED.
4.	ALLOWED as to Transcript page 3350, line 21, through Page 3352, line 17; and DENIED as to rest of Item.
5.	ALLOWED.
6.	DENIED.
7.	ALLOWED.
8.	ALLOWED as to Transcript Page 3414, last line, through Page 3415, line 12; and DENIED as to rest of Item.
9. through 12.	ALLOWED.
13.	DENIED.
14.	DENIED.
15.	ALLOWED.
16.	ALLOWED.
17.	ALLOWED.
18.	DENIED.
19.	ALLOWED.
20.	ALLOWED except for words "Mr. Farrell had delegated to him the responsibility for setting up this meeting in New York. He further told me", as to which quoted words appearing on Page 3527 the Item is DENIED.
21.	ALLOWED.
22.	DENIED, there being no Transcript or Exhibit reference.
23.	ALLOWED.

ITEM NO.	*ACTION BY THE COURT*
24.	ALLOWED as to Beneficial Finance Co. only; and DENIED as to Household and Liberty.
25. through 34.	ALLOWED.
35.	DENIED.
36.	ALLOWED.
37.	ALLOWED.
38.	ALLOWED.
39.	DENIED.

ITEM NO.	*ACTION BY THE COURT*
	"B. Testimony of Charles T. Duffy:"
1. through 4.	ALLOWED.

ITEM NO.	*ACTION BY THE COURT*
	"C. Testimony of Robert S. Leadbetter:"
1. through 4.	ALLOWED.

4.A. 5. The action of this Court on the Motion relating to Indictment No. *11,910*, is as follows:

ITEM NO.	*ACTION BY THE COURT*
	"A. Testimony of William F. Heath:"
1.	ALLOWED.
2.	ALLOWED.
3.	ALLOWED.
4.	ALLOWED as to Transcript Page 3350, line 21, through Page 3352, line 17; and DENIED as to rest of Item.

ITEM NO.	*ACTION BY THE COURT*
5.	ALLOWED.
6.	DENIED.
7.	ALLOWED.
8.	ALLOWED as to Transcript Page 3414, last line, through Page 3415, line 12; and DENIED as to rest of Item.
9. through 12.	ALLOWED.
13.	DENIED.
14.	DENIED.
15.	ALLOWED.
16.	ALLOWED.
17.	ALLOWED.
18.	DENIED.
19.	ALLOWED.
20.	ALLOWED except for words "Mr. Farrell had delegated to him the responsibility for setting up this meeting in New York. He further told me", as to which quoted words appearing on Page 3527 the Item is DENIED.
21.	ALLOWED.
22.	DENIED, there being no Transcript or Exhibit reference.
23. through 32.	ALLOWED.
33.	DENIED.
34.	ALLOWED.
35.	ALLOWED.
ITEM NO.	*ACTION BY THE COURT*
	"B. Testimony of Charles T. Duffy:"
1.	ALLOWED.
2.	ALLOWED.

ITEM NO.	*ACTION BY THE COURT*
	"C. Testmony of George P. Govostes:"
1.	ALLOWED.
2.	ALLOWED.

3. The action of this Court on the Motion relating to Indictments Nos. *11,901*, *11,995*, and *11,997* is as follows:

(a) As to COUNT ONE of each such Indictment:

ITEM NO.	*ACTION BY THE COURT*
	"A. Testimony of William F. Heath:"
1.	ALLOWED.
2.	ALLOWED.
3.	ALLOWED.
4.	ALLOWED as to Transcript Page 3350, line 21, through Page 3352, line 17; and DENIED as to rest of Item.
5.	ALLOWED.
6.	DENIED.
7.	ALLOWED.
8.	ALLOWED as to Transcript Page 3414, last line, through Page 3415, line 12; and DENIED as to rest of Item.
9.	ALLOWED.
10.	ALLOWED.
11.	ALLOWED.
12. through 18.	DENIED.
19.	ALLOWED.
20.	ALLOWED except for words "Mr. Farrell had delegated to him the responsibility for setting up this meeting in New York. He further told me", as to which quoted words appearing on Page 3527 the Item is DENIED.

21.	ALLOWED.
22.	DENIED, there being no Transcript or Exhibit reference.
23.	ALLOWED.
24.	ALLOWED as to Beneficial Finance Co. only and DENIED as to Household and Liberty.
25.	DENIED.
26. through 36.	ALLOWED.
37.	DENIED.
38.	ALLOWED.
39.	ALLOWED.
40.	DENIED.

ITEM NO.	*ACTION BY THE COURT*
	"B. Testimony of Charles T. Duffy:"
1. through 4.	ALLOWED.

ITEM NO.	*ACTION BY THE COURT*
	"C. Testimony of Robert S. Leadbetter:"
1. through 4.	ALLOWED.

(b) As to COUNT TWO of each such Indictment:

ITEM NO.	*ACTION BY THE COURT*
	"A. Testimony of William F. Heath:"
1.	ALLOWED.
2.	ALLOWED.
3.	ALLOWED.

4.	ALLOWED as to Transcript Page 3350, line 21, through Page 3352, line 17; and DENIED as to rest of Item.
5.	ALLOWED.
6.	DENIED.
7.	ALLOWED.
8.	ALLOWED as to Transcript Page 3414, last line, through Page 3415, line 12; and DENIED as to rest of item.
9.	ALLOWED.
10.	ALLOWED.
11.	ALLOWED.
12. through 18.	DENIED.
19.	ALLOWED.
20.	ALLOWED except for words "Mr. Farrell had delegated to him the responsibility for setting up this meeting in New York. He further told me," as to which quoted words appearing on Page 3527 the Item is DENIED.
21.	ALLOWED.
22.	DENIED, there being no Transcript or Exhibit reference.
23. through 32.	ALLOWED.
33.	DENIED.
34.	ALLOWED.
35.	ALLOWED.

ITEM NO.	*ACTION BY THE COURT*
	"B. Testimony of Charles T. Duffy:"
1.	ALLOWED.
2.	ALLOWED.

ITEM NO. *ACTION BY THE COURT*

"C. Testimony of George P. Govestes:"

1. ALLOWED.
2. ALLOWED.

6. In the preceding Par. 5 of this decision, this Court has taken action which admits, against certain corporations, evidence of the statements, acts or conduct of their employees or officers, or of employees or officers of their wholly owned subsidiaries. As bearing upon that type of action, attention is invited to PART TWO, PAR. 4 of this decision, wherein this Court ruled that the evidence warranted or permitted findings or conclusions that such statements, acts or conduct were and constituted the statements, acts or conduct of the employing or parent corporations. In this Court's action in the preceding Par. 5. of this Decision, this Court has gone beyond that, in that it has admitted, against certain corporations, evidence of the statements, acts or conduct of individuals who were not its own employees or officers, nor were they employees or officers of its own subsidiaries. The evidence thus admitted was evidence tending to prove the accomplishment of the objectives of the conspiracies alleged in Indictments Nos. *11,900* and *11,910*, and tending to prove the substantive crimes alleged in Indictments Nos. *11,901*, *11,995*, and *11,997*. The admission of such evidence is not based upon any theory that any person or corporation can be found guilty of a substantive crime solely by reason of the fact, if it be a fact, that he or it was a party to a conspiracy to commit that crime. No such theory is permissible under Massachusetts law. (*Commonwealth* v. *Stasiun*, Mass. A.S. (1965) 605. To the extent that there has been admitted against any corporations, under Indictments Nos. *11,901*, *11,995*, and *11,997*, evidence of the statements, acts or conduct of employees or officers of other corporations, this

Court rules that the evidence introduced at this trial is legally sufficient to warrant or permit findings to the effect that:

(a) The corporation against which such evidence was admitted had expressly or impliedly authorized such individual to act for and in its behalf as to such statements, acts or conduct;

(b) The individual acted for and in behalf of such corporation in making such statements, or in such actions or conduct by him; and

(c) The statements, acts and conduct of the individual were and constituted the statements, acts and conduct of the corporation against whom such evidence was admitted, for which such corporation can be held criminally responsible equally with such individual.

7. In "PART THREE" of its decision of October 17, 1966, on Motions similar to those now being decided but not involving any corporate defendants, this Court ruled that the evidence was legally sufficient to warrant or permit a finding that certain named persons were agents of certain named individual defendants who were charged with the substantive crime of giving, offering or promising bribes, or with the substantive crime of requesting or accepting bribes from individuals. The present Motions involve corporations, either as defendants or as the entities from which individual defendants allegedly requested or accepted bribes. To the extent that the action taken by the Court in disposing of the Motions now before it may depend in part upon the existence of a principal-agent relationship between certain individuals, and between certain individuals and corporations, the Court rules thereon as follows:

(a) The evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient to warrant or permit a finding that the defendant Martin J. Hanley authorized Francis T. Glynn and Wil-

liam F. Heath to act for him and in his behalf in taking any action and doing any act which said Glynn and Heath thought necessary for the purpose of corruptly requesting gifts and gratuities for said Hanley, in the manner, with the intent, for the purpose, and from all of the persons and corporations named in the indictments against Hanley numbered: *11,976 through 11,981,* and *11,983 through 11,992*; and that said Glynn and Heath did so act for and in behalf of the defendant Hanley.

(b) The evidence, with inferences which may lawfully be drawn therefrom is legally sufficient to warrant or permit a finding that the defendant Morris Garfinkle authorized Martin J. Hanley to act for him and in his behalf in taking any action and doing any act which said Hanley thought necessary for the purpose of corruptly requesting and accepting gifts and gratuities for said Garfinkle in the manner, with the intent, for the purpose, and from all of the persons and corporations named in indictments against said Garfinkle numbered: *11,923 through 11,933,* and *11,935 through 11,937*; and that said Hanley did so act for and in behalf of the defendant Garfinkle.

(c) The evidence, with inferences which may lawfully be drawn therefrom, is legally sufficient to warrant or permit a finding that each of the following corporate defendants: Beneficial Finance Co. as to Indictment No. *11,901,* Household Finance Corporation as to Indictment No. *11,995,* and Liberty Loan Corporation as to Indictment No. *11,997,* authorized Nathaniel W. Barber, James S. Pratt, John M. Farrell, Francis T. Glynn, and William F. Heath to act for it and in its behalf in taking any action and doing any act which said persons thought necessary for the purpose of corruptly giving, offering or promising

gifts and gratuities to Martin J. Hanley and Morris Garfinkle, in the manner, with the intent, for the purpose, and otherwise as charged in the indictments numbered above; and that said individuals did so act for and in behalf of each such defendant corporation.

(s) FRANCIS J. QUIRICO
FRANCIS J. QUIRICO
Justice of the
Superior Court

ENTERED:
October 31, 1966.

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK :SS SUPERIOR COURT

Indictment Nos.
[See Below]

COMMONWEALTH

v.

NATHANIEL W. BARBER

ET ALS

[4619] DECISION ON DEFENDANTS' MOTIONS FOR NEW TRIAL

1. On December 18, 1966, the eight (8) defendants listed below were found guilty by a jury on the indictments numbered as indicated following their names:

Defendants	*Indictment Numbers*
Nathaniel W. Barber	11,896, 11,900, 11,910
Beneficial Finance Co.	11,901, 11,900, 11,910
John M. Farrell	11,921, 11,900, 11,910
Francis T. Glynn	11,966, 11,900, 11,910
Household Finance Corporation	11,995, 11,900, 11,910
Liberty Loan Corporation	11,997, 11,900, 11,910
James S. Pratt	11,998, 11,900, 11,910
Lyle S. Woodcock	12,032, 11,900, 11,910

Each of the indictments listed in the first column of numbers contained two (2) counts. The first count charged the defendant with the crime of corruptly giving, offering and promising a bribe to Martin J. Hanley, a public official of the Commonwealth. The second count charged the defendant with the crime of corruptly giving, offering and promising a bribe to Morris Garfinkle, also a public official of the Commonwealth. The indictment numbered 11,900 [4620] charged each defendant with the crime of conspir-

ing to give, offer and promise a bribe to said Martin J. Hanley; and the indictment numbered 11,910 charged each defendant with the crime of conspiring to give, offer and promise a bribe to said Morris Garfinkle. All of said defendants were found guilty as to all of such indictments and counts thereof.

2. The two public officials Martin J. Hanley and Morris Garfinkle were tried together with the eight listed in Par. 1. above, and on the same date, December 18, 1966, they were found guilty by the same jury on the indictments and counts numbered as indicated following their names:

Morris Garfinkle	11,923, Count 1	11,930, Count 1
	11,924	11,931
	11,925	11,932
	11,926	11,933
	11,927	11,935, Count 1
	11,928	11,936, Count 1
	11,929	11,937, Count 1
Martin J. Hanley	11,976	11,985, Count 1
	11,977	11,986, Count 1
	11,979	11,987, Count 1
	11,980	11,989
	11,981	11,990
	11,983, Count 1	11,991
	11,984, Count 1	11,992

Each indictment and count on which these defendants were found guilty charged the particular defendant with the crime of corruptly *requesting* a bribe from a particular person or corporation named therein, such persons and corporations including the eight defendants described in Par. 1. of this decision and certain additional persons and corporations. Each of the five indictments wherein it is indicated above that the defendant was found guilty on "Count 1" thereof, [4621] contained a second count

charging the particular defendant with the crime of corruptly *accepting* a bribe from a person or corporation named therein. The defendants Garfinkle and Hanley were found not guilty on all of those second counts against them.

3. APPENDIX "A" which is attached hereto and made a part hereof gives more detailed information as to the various indictments on which the ten (10) defendants listed in Pars. 1. and 2. above were tried in a single trial, and on which the jury returned the verdicts indicated. At the start of the trial there were four (4) additional indictments (Nos. 11,922, 11,934, 11,978, and 11,988) being tried against the defendant Hanley, and also four (4) additional indictments (Nos. 11,931, 11,932, 11,980, and 11,981) being tried against the defendant Garfinkle. The trial as to these eight (8) indictments was terminated on December 6, 1966, by the direction of a verdict of not guilty. The following indictments or parts thereof were also included in the trial for a period of time, but they were eliminated therefrom by the direction of verdicts of not guilty on November 21, 1966:

Defendants	*Indictment Numbers*
Family Finance Management Corporation	11,919, 11,900, 11,910
Family Finance Corporation	11,920, 11,900, 11,910
State Loan and Finance Corporation	12,029, 11,900, 11,910
State Loan and Finance Management Corporation	12,030, 11,900, 11,910
Gordon J. Thomasch	12,031, 11,900, 11,910

As to Indictments Nos. 11,900 and 11,910, the verdicts of not guilty were directed only in favor of these five defendants, and NOT as to the other defendants who were on trial on those indictments.

[4622] 4. The relative positions of the present defen-

dants, and their relationships, if any, to each other, at the time or times of the alleged offenses were basically as follows:

(a) MARTIN J. HANLEY was the Supervisor of Loan Agencies and a Deputy Commissioner in the Division of Banks and Loan Agencies in the Department of Banking of this Commonwealth. [G.L., CH. 26, SEC. 5A]

(b) MORRIS GARFINKLE was a member of the Small Loans Regulatory Board by appointment of the Governor. [G.L., CH. 26, SEC. 4]

(c) BENEFICIAL FINANCE Co. [hereinafter called Beneficial"] was a Delaware corporation. It owned all of the shares of beneficial interest in three (3) Massachusetts Business Trusts, which Trusts in turn held a total of about fifty-eight (58) licenses to conduct the business of making "small loans" under the provisions of *G.L., Ch. 140, Secs. 96 through 110.* Each such license was for a different location within this Commonwealth. Beneficial also owned all of the outstanding shares of stock of BENEFICIAL MANAGEMENT CORPORATION, also a Delaware corporation [hereinafter called "Beneficial Management"], which in turn furnished management, accounting, and legal services for the operation of the three Massachusetts Business Trusts and their individual loan offices.

(d) JOHN M. FARRELL was employed by Beneficial Management. FRANCIS T. GLYNN was on the payroll of one of the three (3) Massachusetts Business Trusts, but he appeared to report to Mr. Farrell and to work under his supervision. Both Mr. Farrell and Mr. Glynn had some responsibilities with reference to the operation of the loans offices in this Commonwealth by the [4623] three (3) Massachusetts Business Trusts. Such responsibility included work commonly described as

dealing with public relations or industry relations. As to Mr. Glynn, it included direct contact and liaison with Mr. Hanley in the latter's official position.

(e) HOUSEHOLD FINANCE CORPORATION [hereinafter called "Household"] was a Delaware corporation. It held about forty (40) licenses to conduct the business of making "small loans" under the provisions of *G.L., Ch. 140, Secs. 96 through 110.* Each such license was for a different location within this Commonwealth.

(f) NATHANIEL W. BARBER and JAMES S. PRATT were both employed by Household, with Mr. Barber at a higher level than Mr. Pratt. Both had some responsibilities with reference to the operation of Household's loans offices in this Commonwealth. Such responsibility included work commonly described as dealing with public relations or industry relations. As to Mr. Pratt, it included direct contact and liaison with Mr. Hanley in the latter's official position.

(g) LIBERTY LOAN CORPORATION [hereinafter called "Liberty"] was a Delaware corporation. It held about fourteen (14) licenses to conduct the business of making "small loans" under the provisions of *G. L., Ch. 140, Secs. 96 through 110.* Each such license was for a different location within this Commonwealth.

(h) LYLE S. WOODCOCK was the Executive Vice President of Liberty. In that position he had some responsibility with reference to the operation of Liberty's loans offices in this Commonwealth.

All of the defendant corporations, either directly or through subsidiaries, owned or operated loans offices, and perhaps other [4624] types of businesses, in states other than Massachusetts. All of the individual defendants employed by those corporations or their subsidiaries also rendered services in behalf of their employers in connec-

tion with business operations outside of Massachusetts.

5. The two public officials who are defendants, viz. Martin J. Hanley and Morris Garfinkle, had all of the power, authority, duties and responsibilities delegated to, or imposed on them in their respective offices by the various provisions of *G.L., Ch. 140, Secs. 96 through 110.* Under the provisions of *Sec. 100* the Small Loans Regulatory Board [hereinafter called the "Board"], of which the defendant Garfinkle was a member, had the authority and responsibility to "determine and establish by regulation or order a maximum rate of charge in connection with such loans" as were within the limits of the licenses held by the corporate defendants or their subsidiaries. At some time in 1962 the Board took some action and it held some hearings for the purpose of determining and establishing such a maximum rate of charge. The hearings covered a period of from about September to December, 1962.

It is the contention of the Commonwealth that the defendants Hanley and Garfinkle corruptly requested a bribe or bribes from the other eight (8) present defendants, and from certain other persons and corporations, in connection with those 1962 Board proceedings to determine and establish by regulation or order a maximum rate of charge on licensed loans. These two defendants were convicted of those charges, as indicated by PART TWO of APPENDIX "A" attached hereto.

It is the contention of the Commonwealth that the other eight (8) present defendants, viz.: Beneficial, Farrell, Glynn, Household, [4625] Barber, Pratt, Liberty, and Woodcock, conspired together and with certain others, "corruptly to give, offer and promise" a bribe or bribes to Martin J. Hanley, as alleged in Indictment No. 11,900, and also to Morris Garfinkle, as alleged in Indictment No. 11,910; and that said bribes were to be given, offered or promised in connection with those same 1962 Board pro-

ceedings. It is also the contention of the Commonwealth that these same eight (8) defendants corruptly offered and promised such a bribe or bribes to Hanley and Garfinkle in connection with the 1962 Board proceedings. These eight (8) defendants were convicted on both charges of conspiracy and on the several charges of the substantive offenses of giving, offering and promising such bribes to Hanley and Garfinkle in connection with the 1962 Board proceedings. Details of such convictions appear in PART ONE of APPENDIX "A" attached hereto.

6. After prolonged preliminary proceedings attacking these and other indictments against the same and other defendants, this particular case came on for trial on July 18, 1966. There were more preliminary proceedings limited to the indictments involved in this particular trial which delayed the start of impanelling of the jury until July 22, 1966. The trial ended when the jury returned its verdicts on December 18, 1966. The trial transcript covering 102 trial days between July 18, 1966, and December 18, 1966, consists of 7,491 pages. The first 339 pages record the preliminary proceedings; the next 310 pages cover the impanelling of the jury; the Commonwealth's opening comes at Page 724, followed by 141 pages of arguments on Motions for Directed Verdicts and other motions; and the testimony of the first witness starts on Page 904, on August 12, 1966. Between that point and the end of the trial many pages record [4626] arguments on a variety of motions and also record conferences between the court and counsel.

7. The principal witness presented by the Commonwealth was William F. Heath [hereinafter called "Heath"]. He was named as one of the co-conspirators, but not as a defendant, in the conspiracy Indictments Nos. 11,900 and 11,910. He was also named in Indictment No. 11,977 against Martin J. Hanley and Indictment No. 11,925 against Morris Garfinkle as the person from whom those defendants al-

legedly requested bribes. Heath first took the witness stand on September 21, 1966 [Tr. 3,208], and he was the sole witness from that date to November 4, 1966 [Tr. 5,382]. However, he did not testify on all of the intervening dates because of many hearings and conferences which interrupted or suspended his testimony. Although his testimony is spread over 2,174 pages, it actually covers about 1,001 pages, as shown in detail in APPENDIX "B" attached hereto and made a part hereof. The approximate extent of examination and cross-examination of the witness Heath by the parties, based on transcript pages, is as follows:

	No. of Pages	*Total No. of Pages*
Commonwealth of Massachusetts		547
Nathaniel W. Barber	158	
Beneficial Finance Co.	None	
John M. Farrell	44	
Francis T. Glynn	5	
Household Finance Corporation	10	
Liberty Loan Corporation	19	
James S. Pratt	61	
Lyle S. Woodcock	48	
Martin J. Hanley	69	
Morris Garfinkle	40	454
TOTAL: ALL PARTIES		1,001

The statistics above and on APPENDIX "B" are approximate only, and they may include some pages covering arguments or conferences relating [4627] to some phase of Heath's testimony. The practice followed in the cross-examination of the witness Heath was for counsel for a defendant to cross-examine in behalf of his client only. Thereafter most of the defendants adopted the whole or certain specified portions of the cross-examination of Heath by counsel for other defendants, with the result that much

of the cross-examination became applicable to many of the defendants even though not conducted by their particular counsel.

8. The witness Heath spent most of his life in the employment of firms engaged in the business of lending money, and particularly making small loans of the type covered by the provisions of *G.L., Ch. 140, Secs. 96 - 110.* For many years prior to this trial he was an employee or officer of the American Investment Company of Illinois, which did business at various places in Massachusetts under the name of Public Loan Company. Heath's position included responsibility for his employer's "industry relations" or "public relations" in Massachusetts and several other states; and it was similar in that respect to the positions held by the defendants Barber, Pratt, Farrell, and Glynn with their respective employers. He gave much testimony of his background in the small loans business, and of his associations with the present defendants and with other alleged co-conspirators. The testimony concerned many events, meetings, conferences, and conversations between him and such other persons at various times and places over a period of years prior to the trial. He also gave specific testimony concerning particular meetings and conversations with reference to the alleged conspiracy to give, offer or promise bribes to Hanley and Garfinkle in connection with the 1962 Board proceedings, and with reference to the [4628] alleged requests by Hanley and Garfinkle for bribes in connection with the same proceedings. Two of such meetings described by Heath in his testimony were the following:

(a) A meeting at Purcell's Restaurant in Boston on some date prior to October 17, 1962, attended by Heath, Glynn, and Pratt, at which Heath said there were discussions about a request from Hanley for a

bribe, and about the positions to be taken by those present on that request; and

(b) A meeting at the Hotel Commodore, in New York, on October 17, 1962, attended by Heath, Glynn, Pratt, Barber, Farrell, Woodcock, and certain other persons connected with the small loans business and some of whom were named as co-conspirators in Indictments Nos. 11,900 and 11,910. Heath said that at this meeting there were discussions about Hanley's request for a bribe, and about what the industry's action should be thereon, and that some action was decided upon.

In Heath's testimony of the two meetings at Purcell's Restaurant and at the Hotel Commodore he gave the substance of statements made by various persons in attendance, as well as other details of the meetings. The defendants did not testify; and Heath was the only alleged co-conspirator who testified at the trial.

9. Before the start of this trial Heath had made entries in records and had made statements under various circumstances concerning himself, the present defendants, and other persons and corporations engaged in or concerned with the small loans business. The principal types of such records and statements were the following:

(a) In the latter part of 1963 and the beginning of 1964 Heath made many appearances before the Massachusetts [4629] Crime Commission [hereinafter called the "Commission" or the "Crime Commission"] which had been established by *Chapter 146 of the Resolves of 1962* for the investigation and study of crime and corruption. Most of the appearances were in the form of meetings or conferences with the Commission counsel. He gave the Commission much detailed information and some records concerning himself and other persons and corporations, including the present

defendants, in connection with the Commission's investigation of various phases of the small loans business. At some of such conferences he was accompanied by counsel, and at others he was not. His appearances were the result of consultation by him with his superiors and were with their knowledge and approval. The conversations at some, but not all, of the conferences and meetings were stenographically recorded and transcribed. In about December, 1963, Heath's employer had delivered to the Commission the carbon copies of weekly expense vouchers which Heath had prepared and submitted to his employer for reimbursement from 1959 to October, 1963. Starting in about January, 1964, and continuing over a period of months, the Commission delivered to the Attorney General a large volume of records, documents and material including transcripts of some of Heath's statements, to the Attorney General. This was done in connection with the presentation of the matter to the Special Grand Jury starting in January, 1964.

(b) All of the indictments involved in this trial were returned in May, 1964, by a Special Grand Jury which had been convened in January, 1964. Heath testified before that Special Grand Jury on various dates prior to the return of the indictments. [4630] His testimony related in part to the offenses alleged in these indictments, and in part to various other matters in some way involving the small loans business but which related to other indictments not involved in this trial. All of his testimony was recorded stenographically, and a transcript was made thereof. Before the start of this trial the Attorney General had received the transcript of all of Heath's testimony before that Special Grand Jury.

10. The total volume of records, documents and ma-

terial turned over to the Attorney General by the Commission amounted to the equivalent of the contents of about twenty-four (24) ordinary file drawers. It was not all delivered at one time, but the delivery was completed before the start of this trial on July 18, 1966. It included the following, but was not limited thereto:

(a) All of the carbon copies of the weekly expense vouchers which had been submitted by Heath to his employer and furnished by the latter to the Commission; and

(b) Copies of all available transcripts of testimony, interviews, or statements given or made by Heath to the Commission or to its attorneys.

By the time this trial was started, the Attorney General had added the equivalent of the contents of about four (4) to six (6) ordinary file drawers of material to that received from the Commission. The added material included transcripts of all of the testimony given by Heath before the Special Grand Jury between January and May, 1964. In this total volume of material thus received and accumulated by the Attorney General some was solely and clearly relevant to the indictments tried starting July 18, 1966, and some was clearly not [4631] relevant thereto. The Special Grand Jury sitting from January to May, 1964, had returned many other indictments against persons and corporations engaged in or concerned with the small loans business, and against certain public officials, which indictments charged offenses unrelated to those involved in this trial. The Attorney General had acquired material with reference to all of the indictments returned by that Special Grand Jury, and not limited to the indictments tried in this case.

11. At various times before and during this trial the defendants seasonably and diligently sought and requested full and complete disclosure by the Commonwealth of any-

thing in its possession which might be helpful to them in their defense of the charges against them. The requests were sometimes in the form of written motions, and at other times in the form of oral requests. The Transcript of the trial includes references to such requests at various dates and places. The Commonwealth, through Assistant Attorney General Herbert F. Travers, Jr., the prosecutor at the trial [hereinafter called the "Prosecutor"], on a number of occasions stated in open court, or at bench or lobby conferences, that it would make available to them whatever material it had in its possession relating to the indictments on trial. Prior to and during the trial, the Prosecutor caused copies to be made of a large volume of records, documents and material in his possession and which he thought might relate to the indictments on trial; and he seasonably furnished the defendants with such copies. As to some material he made the original available to the defendants for their reproduction of copies for their use. In this connection the Prosecutor or persons acting for and under him made a reasonable and diligent search and examination [4632] of all of the material in the Commonwealth's possession. The Commonwealth seasonably delivered to the defendants either the originals or copies of all the material in its possession which the Prosecutor thought related to the indictments on trial and which he thought the defendants were entitled to receive. On one or more occasions when the defendants inquired about material in the possession of the Commonwealth on a particular issue or subject, the Prosecutor stated that he had delivered to them all he had thereon.

12. On July 17, 1967, about one year after the start of the present trial [sometimes hereinafter called the "first trial"], another trial [sometimes hereinafter called the "second trial"] was started on different indictments naming as defendants all of the present defendants [except

Garfinkle] and certain other persons and corporations. One of the indictments in the second trial [No. 11,908] charged the present defendants [except Hanley and Garfinkle] and also certain other persons and corporations with an unlawful conspiracy to bribe Hanley. That indictment also named Heath and others as co-conspirators but not as defendants. Certain indictments in the second trial charged Hanley with requesting and accepting bribes from Heath and from certain persons and corporations other than the present defendants. During the second trial the Prosecutor, who was again Mr. Travers, continued the practice followed in the first trial of turning over to the defendants copies, or the originals for copying, of large quantities of records, documents and materials which the Commonwealth had in its possession and which he thought related to the issues involved in the indictments included in the second trial. In some respects this material duplicated some parts of that given the defendants during the first [4633] trial. Included in the material which the defendants thus received during the second trial were the following items which became a factor in the defendants' filing of Motions for New Trial as to the first trial:

(a) The Commonwealth made available to the defendants all of the carbon copies of the weekly expense vouchers which Heath had submitted to his employer, which the latter had furnished to the Crime Commission, and which the Commission had delivered to the Attorney General. None of these had been furnished the defendants during the first trial.

(b) The Commonwealth made available to the defendants either copies, or the originals for copying by the defendants, of all or substantially all of the transcripts which the Commonwealth had of any testimony given by Heath to the Special Grand Jury between January and May, 1964, and of all or substantially

all of the transcripts which it had of any testimony, interviews, or statements given or made by Heath to the Crime Commission or to its attorneys. This included much material not furnished to the defendants during the first trial.

13. After the present defendants received the additional material which is described in Par. 12. above, all of them filed Motions for New Trial as to the indictments on which they had been found guilty by the jury on December 18, 1966. All of the motions appear to state one basic or common ground, which is substantially the following: that some of the material which they received during the second trial (particularly Heath's expense reports and certain transcripts of his testimony or statements) was relevant to the issues involved in the first trial, that the Commonwealth had this [4634] material during the first trial, that it had a duty to make it available to the defendants, that it did not make it available to them, and that its failure to do so prejudiced them in their defense and violated their constitutional rights. The motions of some defendants allege additional grounds, and they will be discussed separately.

14. All defendants seek a new trial in part on the ground that the Commonwealth withheld Heath's weekly expense vouchers from them. This Court has already found in the preceding paragraphs that the Commonwealth had possession of the vouchers for a period of time prior to the start of this trial, and that it did not make them available to the defendants during the trial. Some of the defendants allege that the Commonwealth withheld transcripts of Heath's Crime Commission appearances and of the Special Grand Jury testimony by Heath, which transcripts made reference to Heath's weekly expense vouchers. This Court finds that the Commonwealth did have such transcripts in its possession for a period of time prior to the

start of this trial, and that it did not make them available to the defendants during the trial. The positions of the parties differ in the following respects as to these vouchers and transcrips:

(a) The Motions of the defendants Household, Barber, Pratt, Liberty, and Woodcock allege the withholding or suppression of the vouchers and transcripts to their prejudice, but they allege no intentional misconduct or bad faith in connection therewith. Indeed, the brief of the defendants Household, Barber, and Pratt says, at Page 2 thereof:

> "We do not allege in the motions any bad faith on behalf of any of counsel representing the Commonwealth. We do not allege any type of professional [4635] misconduct in the manner in which this phase of the prosecution was handled. We do not allege that the material which was not made available was intentionally and wilfully suppressed. We do not make these allegations because we do not have to. . ."

(b) The Motions of the defendants Beneficial, Farrell, Glynn, Hanley, and Garfinkle allege [e.g., Page 6, Par. 6 of Beneficial motion] that: "*The Commonwealth made a deal with Heath that his expense reports would be suppressed.*" [Emphasis supplied.] These five defendants introduced no evidence at the hearing on their Motions for New Trial. The defendants Beneficial, Farrell, and Glynn not only introduced no evidence, but they clearly stated on one or more occasions [Tr. of 9/8/69, Pages 5, 6, 7, 18, 39, and 52] that they wanted their motions decided solely on the basis of the allegations contained therein and in the affidavits made a part thereof, and not on the basis of any evidence presented by any other moving parties. As the basis for their allegations of a "deal"

by the Commonwealth to suppress Heath's expense vouchers, these five defendants quote portions of testimony given by Heath on February 19, 1968, and by Marshall Simonds, former counsel for the Crime Commission and former Special Assistant Attorney General, on May 5, 1968, during the course of the second trial. The Commonwealth filed no controverting or counter affidavits, and filed no denials of the allegations of these five defendants. The mere fact that there were no such controverting or counter affidavits and that there were no denials does not mean that this Court is required or compelled to accept the allegations of the defendants as true and to find the facts to be as alleged by them. See: *Commonwealth* v. *Sacco*, 255 Mass. 369, 449; *Commonwealth* v. *Devereaux*, 257 Mass. 391, 395. "A judge is no more bound to [4636] accept as true an uncontradicted affidavit than to believe an uncontradicted witness." *Commonwealth* v. *Millen*, 290 Mass. 406, 410. See also: *Commonwealth* v. *Doyle*, 323 Mass. 633, 637. In any event, even on the basis of the quoted portions of the testimony of Heath and Simonds, this Court may make its own decision as to whether or not the Commonwealth made a "deal" with Heath to suppress his expense vouchers; and it is not bound thereon by the uncontroverted conclusion and allegation of parties that there was such a "deal." The Court finds that the allegations of these five defendants as to a "deal" to suppress Heath's expense vouchers are DISPROVED. The Court finds that the Commonwealth DID NOT make a deal with Heath to suppress his expense vouchers.

15. There is no entry on Heath's weekly expense vouchers naming Glynn or Pratt in connection with any luncheon meeting at Purcell's Restaurant in Boston on or about the date that Heath, by his testimony, said he met with them

at that place. It is the contention of some defendants that the same situation prevails as to certain other dates when, and places where, Heath testified he met with certain of the defendants and other persons. The defendants now argue that, if Heath's weekly expense vouchers were available to them at the first trial, they could have cross-examined him about the absence of such information from the vouchers. While all defendants make the same contention of prejudice by reason of the alleged withholding of the vouchers from them, the factual background on which the contentions are to be judged differs as to certain defendants as hereinafter appears.

(a) The defendants Household, Barber, and Pratt introduced evidence concerning the nature, function, and purpose of Heath's [4637] expense vouchers at the hearing on their Motions for New Trial. Thereafter the defendants Liberty and Woodcock amended their previous motions to include the matter of the alleged withholding of Heath's expense vouchers from them; and, when they did, they adopted all of the evidence previously introduced by others on this issue. [Tr. 257-263; 270-271] It is appropriate to note at this point that Heath's testimony at the trial concerning the meeting at Purcell's Restaurant was not admitted as to the defendants Liberty and Woodcock; and thus it is questionable whether they are in a position to complain now about the absence of reference to that meeting in Heath's expense vouchers. Based on the evidence introduced at the hearing on the Motions for New Trial as to the nature, purpose, and function of Heath's expense vouchers, the facts hereinafter found apply to the defendants Household, Barber, Pratt, Liberty, and Woodcock. The vouchers were the basis upon which Heath was reimbursed by his employer for sums expended by him for trans-

portation, lodging, food, and certain other related business expenses incurred in the course of his work. Sums expended by Heath in entertaining other persons for business purposes were also reimbursed to him if entered on the vouchers. The printed form of voucher provided spaces for the entry of expenses under a separate column for each day of the week, and opposite each of several printed categories, such as: "Hotel," "Breakfast," "Lunch," "Dinner," "Fare," "Baggage," "Bus, Taxi," "Telephone — Telegraph," "Postage," and "Auto Hire." There was then a space for explanation by footnote as to certain items. There were printed instructions on the back of the form as to the manner in which it should be completed. One of the instructions read as follows: [4638]

> "4. . . For instance, if the first item requiring explanation is that you took 2 people to lunch on Monday, put 'a' in the LEGEND column next to the amount. Put 'a' under EXPLANATION followed by the names of the 2 persons. The next item requiring explanation is of course marked 'b', etc."

Some of the "EXPLANATION" for expenditures was sometimes entered on a separate sheet attached to the voucher, along with any paid bills or receipts for the expense items listed. At all times material to this case, Heath had separate instructions from his superior to the effect that he should not include the names of any public relations men for other companies on his expense vouchers. The expense vouchers were not complete records of Heath's daily activities, but only records of expenditures for which he sought reimbursement from his employer. If he met with other persons for the business of his employer, that meeting would not appear on his expense vouchers unless he spent some money in connection therewith. If there

was no expenditure by him in meeting with or entertaining those other persons, the fact of the meeting would not appear on the vouchers. If he personally incurred expense in travel to some other place on his employer's business, his items of expense would appear; but the fact that he met other persons at his destination, and their names, would not appear on the vouchers unless he incurred expense in entertaining them. Heath's expenditures for his own meals in Boston were not reimbursed to him, whether he ate alone or whether he ate with others on a "Dutch treat" basis. Heath's expense vouchers were limited to entries of expenditures made by him and for which he sought reimbursement; and the absence of any entry for a luncheon at Purcell's Restaurant, or for any similar occasion or meeting, is not evidence that such luncheon [4639] or meeting did not occur. It may be evidence that Heath incurred no reimbursible expense for such a meeting, but it does not prove that the meeting did not take place. The vouchers are not intended to be, and they were not, full and complete reports or records of all Heath's daily activities. They were records of only those activities in which he incurred reimbursible expense.

(b) The defendants Beneficial, Farrell, Glynn, Hanley, and Garfinkle having presented no evidence at the hearing on their Motions for New Trial, their motions must be decided solely on the basis of the allegations contained therein and in the affidavits made a part thereof. Attached to each of their motions there is a photocopy of Heath's expense voucher for the week ending August 25, 1962, and a copy of the Instructions printed on the reverse side of the voucher. A portion of Instruction No. 4 is quoted in the preceding subparagraph of this decision. The printed form of ex-

pense voucher provided by Heath's employer, and the printed instructions on the reverse side thereof, indicate clearly that the form was to be used as the basis for reimbursing Heath for his expenses incurred in the furtherance of his employer's business, but not including his own personal expenses at his home station, which was Boston; and that it was not intended to be, and was not, a full and complete report or record of all of Heath's daily activities. It was a record of only those activities in which he incurred reimbursible expense. Heath was not required by the form or instructions to make any entry thereon as to any meeting or occurrence for which he did not seek expense reimbursement. The absence of reference to any particular meeting or occurrence [4640] is not evidence that it did not take place, but rather it is evidence that Heath incurred no reimbursible expense with reference thereto. These five defendants seek to counter the quite obvious nature, function, and purpose of the printed forms of expense vouchers and the instructions which are a part thereof by quoting [on Page 2 of each of their motions] the following questions to, and answer by, Heath from Page 3451 of the transcript:

> "Q. Now with reference to these social occassions when you were with Mr. Hanley and Mr. Glynn in Boston and the occasions that you described as outside of Boston, can you tell us who paid the bill?
>
> "A. The bills were paid pro-rata among the public relations men who might be present on the various occasions."

It is to be noted that the question and answer refer only to certain "social occasions" when Heath was with Hanley and Glynn. It must also be noted that it is obvious from a reading of the complete transcript on

this particular line of inquiry that the quoted question and answer relate back to the following questions by Mr. Travers on Pages 3440 and 3448 respectively:

> "Q. Mr. Heath, with reference to the time period 1960 through September of 1963, do you recall any occasions when you were with Mr. Glynn and Mr. Hanley, which occasions were of a social nature and in Boston?"
>
> "Q. Mr. Heath, outside of the City of Boston and with reference to only occasions where you did not stay overnight, do you recall being with Martin Hanley and Francis Glynn . . . with reference to the period of time between 1960 and September of 1963?"

As to these "outside of Boston occasions" Heath testified [Tr. 3450] that one was social and one was not. That was followed immediately by the question and answer which the defendants have quoted on Page 2 of their respective motions about "these [4641] social occasions" when the bills were paid pro-rata among the public relations men. The photocopy of Heath's expense voucher for the week ending August 25, 1962, attached to the defendants' motions, shows an entry of a "Pro Rata Share — Glynn — Benf." for entertainment of guests including Hanley. All of the testimony quoted above from the defendants' motions and from the trial transcript was limited to "social occasions" at which Heath, Glynn, and Hanley were present; and all of that testimony was given by Heath on September 23, 1966. That testimony clearly did not refer or apply to any business meetings; and it clearly did not refer to or apply to the meeting at Purcell's Restaurant. The first testimony from any witness as to the Purcell meeting came from Heath on September 27, 1966, on Page 3529 of the trial transcript. The defendants Beneficial,

Farrell, Glynn, Garfinkle, and Hanley contend, in effect, that because Heath, in his two-line answer which they have lifted out of context from Page 3451 of the trial transcript and quoted on Page 2 of their motions, testified that "the bills [for these social occasions when he was with Hanley and Glynn] were paid pro-rata among the public relations men who might be present on the occasions, and because Heath's vouchers show only one such pro-rata sharing of expenses, this Court must therefor conclude that there were no other occasions when Heath met with Glynn and Hanley, and that Heath's vouchers would be proof of the absence of any such other meetings. This Court is not required to so conclude; and it does not so conclude. The Court is not convinced on this issue by the defendants' lifting of the two-line fragment out of context from the 7,491 pages total transcript of the trial testimony and proceedings. In any event, [4642] the fragment does not apply to the meeting at Purcell's Restaurant because if the meeting occurred it was a business meeting and not a social occasion, and also because there was no evidence that Hanley was there. On the issue of whether the defendants Beneficial, Farrell, Glynn, Garfinkle, and Hanley were prejudiced by the Commonwealth's failure to give them Heath's expense vouchers during the first trial, they are in no better or different position by reason of their reliance on the fragments of evidence included in their motions than are the other five defendants Household, Barber, Pratt, Liberty, and Woodcock who presented evidence at the hearing on their motions.

16. During the course of cross-examination by defense counsel, the witness Heath testified as follows:

(a) *Cross-examination by Attorney Auerbach representing defendant Garfinkle* [Tr. 4758]:

"Q. Well, these [the defendants] *are all your friends* in the companies? [Emphasis supplied.]

"A. They *were my friends.* [Emphasis supplied.]

"Q. Known them for a good many years?

"A. Some of them.

"Q. Very good friends of yours, except Mr. Garfield or Mr. Garfinkle, is that right?

"A. I only met him once.

"Q. The rest *were* close friends of yours over a period of years, were they not? [Emphasis supplied.]

"A. I think that's a fair statement."

That testimony, when given, was limited to the defendant Garfinkle; and it was not thereafter adopted by any other defendants.

(b) *Cross-examination by Attorney Featherston representing* [4643] *Liberty* [Tr. 5345]:

"Q. Would it be fair to say that you at least were not on cordial terms with *Liberty personnel here in your area*? [Emphasis supplied.]

"A. It is fair to say that I believe I was on cordial terms with all of *the personnel in my area.* [Emphasis supplied.]

"Q. Oh.

"A. I think that's fair to say."

That testimony, when given, was limited to the defendant Liberty; and it was not thereafter adopted by any other defendants.

17. During the course of the second trial the Commonwealth furnished the defendants with additional portions of the transcripts of Heath's testimony before the Special Grand Jury in 1964. Included in these additional portions, but not included in the portions of such testimony given the defendants during the first trial, there was certain testi-

mony by Heath about a conversation which he had with the defendant Woodcock in 1957. Heath's testimony included the following statement:

> "I don't know whether you want this aside or not — but, this is nothing but blackmail, as far as I'm concerned. I'm sitting there being blackmailed. That's the interpretation placed on this as far as I'm concerned."

The whole of this portion of his testimony appears in the Substitute Motion for New Trial by Liberty and Woodcock [Pages 8-9], and in each of the Motions for New Trial by Household, Barber, and Pratt [Pages 5-6]. It is questionable whether Heath's interpretation that he was being blackmailed is correct, or whether the correct interpretation is that he, Heath, was being asked by Woodcock to blackmail the defendant Hanley. The defendants Liberty, Woodcock, Household, Barber, and Pratt include as one of the grounds of their Motions for New Trial the alleged prejudice to them from the Commonwealth's [4644] failure to give them the portions of Heath's Grand Jury testimony about this experience with Woodcock. They contend that if they had that transcript during the first trial they could have discredited that part of Heath's testimony which is quoted in Par. 16 (a) above during cross-examination by counsel for Garfinkle, and in Par. 16 (b) above during cross-examination by counsel for Liberty.

(a) The defendant Garfinkle does not raise this issue; and it is questionable whether any other defendant has the right to request a new trial because of that piece of evidence quoted in Par. 16 (a) above and which was limited to the defendant Garfinkle. Even assuming the defendants Liberty, Woodcock, Household, Barber, and Pratt have standing to raise this issue as to the impeachment by them of testimony which was limited to the defendant Garfinkle, it does not appear that this part of Heath's Grand Jury testimony and his testi-

mony thereon at this trial are inconsistent to any material degree on his relations with Mr. Woodcock. Heath did not testify at this trial that all of the other defendants were then his friends. It is significant that when Mr. Auerbach asked Heath on October 21, 1966, [Tr. 4758] whether "... these [the defendants] *are all your friends* in the companies," Heath's answer was, "They *were my friends.*" [Emphasis supplied.] He did not claim or testify that all the defendants were his friends at the time he was testifying. If they were no longer friends at the time of trial, the reason is understandable. Neither did he specify when they *were* all his friends. Indeed, an examination of the entire transcript of his testimony at this trial indicates that he had worked with Woodcock for the same employer for a number of years before Woodcock left to go with Liberty, and [4645] that they were good friends "over a period of years." That is not inconsistent with Heath's Grand Jury testimony about the "blackmail" conversation with Woodcock. Further, between the date of that conversation and the time of trial in this case, nine years had elapsed, and there was much evidence of friendship between Heath and Woodcock during the intervening period.

(b) As to the testimony given by Heath on cross-examination by counsel for Liberty, as quoted in 16 (b) above, it is questionable whether any defendant other than Liberty has the right to request a new trial because of that piece of evidence which was limited to the defendant Liberty. In any event, it does not appear that this part of Heath's Grand Jury testimony and his testimony thereon at this trial are inconsistent on his relations with Woodcock. On the evidence at this trial, Woodcock's place of employment was in or near St. Louis, Missouri, at the headquarters

of Liberty. He was not stationed in the Massachusetts or New England area in behalf of Liberty, and he made only infrequent trips to Massachusetts. Before the Special Grand Jury in 1964 Heath said he had a conversation with Woodcock in 1957 which he interpreted as involving "blackmail." At this trial on November 4, 1966, Heath testified: "It is fair to say that I believe I was on cordial terms with all of the [Liberty] personnel *in my area.*" Heath's area was primarily the New England area. Woodcock was Liberty's Executive Vice-President at Liberty's home office in Missouri, and was not at any time part of the Liberty personnel in Heath's area. Heath's testimony before the Special Grand Jury about the conversation in connection with which he used the word "blackmail" was about a conversation with Woodcock; and his testimony at this trial about his cordial relations with all Liberty personnel in his area did [4646] not refer to Woodcock.

18. The "Substitute Motion for New Trial" as amended, by Liberty and Woodcock, alleges in part that the Commonwealth withheld from them certain portions of the transcript of Heath's Grand Jury testimony which would have been exculpatory of the defendants, or might have shown contradictions in Heath's trial testimony. The motions may also be read as alleging misrepresentations by the Commonwealth as to the nature of such portions of the transcripts allegedly withheld. These two defendants seek to prove these allegations by fragments of Heath's testimony taken out of context, either from Grand Jury testimony or from trial testimony. This Court is not convinced that the minute fragments lifted out of context from the voluminous total transcript of all of Heath's testimony prove the allegations of the defendants. The follow-

ing brief statements should be sufficient to dispose of these contentions:

(a) In one part of the affidavit attached to the motion of the defendants they refer to the fact that on one date or page of the transcript of Heath's Grand Jury testimony he did not "say that Lyle S. Woodcock made any statement at the meeting at the Hotel Commodore in New York City on October 17, 1962, much less an incriminating one," or that he did not say Woodcock was present at that meeting. Neither the defendants nor this Court can expect that on every date and on every page of the transcript of every statement made by the witness Heath, or by any other witness, the witness will give and repeat the aggregate of all of his testimony on any particular issue, event, occurrence, or case. This is not so, and it cannot be so; no more than it is possible to erect the entire walls of a brick [4647] building with each brick, or with each course of bricks, or with each day's work in the construction of the building. The consistency or inconsistency of Heath's testimony on a given point cannot be determined by a super-selective lifting of fragments of evidence out of context in a studied effort to reach a strained conclusion. If anything further were necessary to demonstrate the strained quality of the contention that in his Grand Jury testimony Heath did not say that Woodcock was at the Hotel Commodore meeting of October 17, 1962, all that need be done is to look at Pages 2 and 3 of the affidavit of these defendants. There the defendants quote at length from Heath's Grand Jury testimony placing Woodcock at the meeting and further describing what took place there. The defendants had that transcript during the present trial. The allegations of the defendants Liberty and Woodcock about

the Commonwealth's withholding of Heath's prior exculpatory or inconsistent testimony concerning Woodcock are DISPROVED; and their allegations of the Commonwealth's misrepresentations concerning such testimony are also DISPROVED.

19. The principal thrust of Liberty's and Woodcock's "Substitute Motion for New Trial" is that the Commonwealth intentionally made two misrepresentations to their counsel, knowing them to be false, that their counsel relied on them to their prejudice, and that their constitutional rights were thus violated. One alleged misrepresentation related to the Commonwealth's statement to these defendants that they had been furnished all of the relevant Grand Jury testimony of Heath against them. That subject has been covered in earlier paragraphs of this decision, and the Court has found, and now finds that there were no such misrepresentations. These defendants [4648] Liberty and Woodcock allege that at a time when their counsel were about to cross-examine Heath and in connection therewith "to use certain apparently exculpatory and contradictory grand jury testimony" of Heath against them, the Commonwealth misrepresented to them that if they attempted to do so "it would result in the introduction of evidence of another crime." The full text of the statement thus made by the Commonwealth, and which the defendants allege to have been false, is set forth in Par. 9, Pages 4 and 5, of the affidavit attached to their motion. These allegations by the defendants Liberty and Woodcock as to misrepresentations by the Commonwealth are DISPROVED. The Commonwealth did not intentionally or otherwise make any misrepresentation in the statements attributed to it by the defendants. There was evidence in existence that at the meeting held at the Hotel Commodore on October 17, 1962, there was conversation about matters other than the alleged payment of a bribe to Han-

ley and Garfinkle, that such other conversations related to other criminal acts or conduct, and that Woodcock had been present at the meeting and had engaged in some part of such other conversation. The action of the Commonwealth in making the statement which it made to counsel for Liberty and Woodcock was a perfectly correct, proper, and truthful statement under all of the circumstances. These defendants were represented by able and experienced counsel who were free to weigh the statement and make their own decisions thereon, and they did so. They were free to continue cross-examination or not, as they saw fit. If they decided not to cross-examine further on any point, it was not because of any misrepresentation by the Commonwealth. It is not necessary for the Court or anyone else to indulge in the idle luxury of hindsight and thereby speculate whether the decision of counsel on matters of trial strategy was correct or not. Counsel are not [4649] to be judged or criticized on the basis of hindsight. The most which can be expected of them is that they exercise their best judgment at the time of decision, even though the ultimate jury verdict or other considerations may indicate that another course might have been worth considering.

20. The defendants had a full and complete opportunity to cross-examine the witness Heath to the extent that they desired to do so. In addition thereto they had a full and complete opportunity to adopt for themselves any part or all of the cross-examination of Heath by counsel for other defendants. No time limit was placed on such cross-examination by the Court. No defendant was prevented from cross-examining the witness on the same subject or subjects on which other defense counsel had cross-examined him. The total of transcript coverage of the examination of Heath is given in Par. 7. above on APPENDIX "B" hereto as approximately five hundred forty-seven (547) pages for the Commonwealth and four hundred fifty-four (454)

for the defendants. If that were corrected by eliminating pages recording arguments or conferences, the coverage for the Commonwealth and for the defendants would be about the same. For example, of the one hundred two (102) pages attributed to the Commonwealth on September 21, 1966, ninety (90) were for a conference, and the same is true of twenty-nine (29) pages on September 22. If any defendant did not cross-examine Heath, or any defendant limited his cross-examination of Heath, it was not due to any limitations of time imposed by the Court. The opportunity for such cross-examination arose and continued after the Commonwealth had made a full, complete, and fair disclosure and delivery to the defendants of all which the Commonwealth was required by law to disclose or deliver. It was [4650] probably the most full and complete disclosure ever made in the trial of a criminal case in this Court. The Court and counsel spent many hours, and in some instances entire days, on this subject of discovery by the defendants and disclosure by the Commonwealth. An example of this will be found in the transcripts for September 23, 1966, and September 26, 1966, showing a conference by counsel and the Court, certain agreements made by the Commonwealth, and the reports thereon as to what was made available or delivered to defendants. The transcript references to the discovery requests by defendants, and resulting agreements or action, are not limited to those two dates, nor are they limited to the few references thereto in the defendants' Motions for New Trial.

21. In addition to the facts hereinbefore specifically found, the Court finds, concludes, and decides as follows:

(a) The Commonwealth acted with full and complete reasonableness, diligence, and good faith in examining its files and records to search for material which the defendants might be entitled to see or receive in connection with the first trial;

(b) The Commonwealth acted with full and complete reasonableness, diligence, and good faith in considering and deciding what material it was required to make available to the defendants in connection with said trial;

(c) The Commonwealth did not consciously, knowingly, intentionally, or otherwise suppress or withhold from the defendants any material which the defendants were entitled to see or receive in connection with said trial;

[4651] (d) The Commonwealth did not consciously, knowingly, intentionally, or otherwise make any misrepresentation to the defendants as to what material or information it had in its possession, or as to whether it had made available to them all of the material which it had and which they were entitled to see or have in connection with the first trial;

(e) The defendants have failed to prove the violations of their constitutional rights as they have alleged in their Motions for New Trial;

(f) The defendants have failed to prove the existence of any of the grounds alleged by them as the basis for their Motions for New Trial; and

(g) All of the Motions for New Trial filed by all of the defendants should be DENIED as to all of the grounds alleged therein.

22. The defendants Beneficial Finance Co., John M. Farrell, Francis T. Glynn, Martin J. Hanley, and Morris Garfinkle filed four (4) "REQUESTS FOR RULINGS OF LAW" at the close of the hearing. They were separately numbered "1." through "4." Thereafter they filed withdrawals of the Requests numbered "2." and "3." Requests numbered "1." and "4." are as follows:

"1. If it be found that the Commonwealth was in possession during the trial of the expense accounts

covering the period June 1, 1962, to September 30, 1962, and did not make them available to the defendant, the Commonwealth now has the burden of showing, beyond a reasonable doubt, that the production of those documents would not have altered the verdicts as to this defendant.

"4. During the trial, and prior to cross-examination of Heath, all defense counsel requested 'that there should be no holding back of things that would be exculpatory or a source of impeachment'; the trial court explicitly recognized that such a request was being made and called it to the attention of the prosecutor. (Tr. 3502-3)."

[4652] The ruling of this Court on the remaining Requests as to all of such five (5) defendants is as follows:

Request No. 1 is DENIED; and

Request No. 4 is correct statement of what appears in the trial transcript of Pages 3502-3503; however, it does not appear to be a request for a ruling of law. It is a correct statement of what occurred, whether it be a statement of fact or a request for a ruling.

23. The Court having heard and considered all of the Motions for New Trial filed by all of the defendants named in Pars. 1. and 2. of this Decision, and as to all of the indictments against said defendants as also listed in said Pars. 1. and 2., hereby ORDERS that all of said motions be and the same hereby are DENIED as to all of said defendants and indictments, and as to all grounds alleged therein or in the affidavits attached thereto.

(s) FRANCIS J. QUIRICO
FRANCIS J. QUIRICO
Justice of the Superior Court

DATED:
November 24, 1969

FILED
November 24, 1969

[4653] APPENDIX "A"

PART ONE

Paper No. 411 — CONTINUED

LISTS OF DEFENDANTS (OTHER THAN PUBLIC OFFICIALS) AND OF CRIMES AND INDICTMENTS ON WHICH FOUND GUILTY

NAMES OF DEFENDANTS	CONSPIRACY TO GIVE A BRIBE TO:		GIVING, OFFERING OR PROMISING A BRIBE TO:	
	MARTIN J. HANLEY	MORRIS GARFINKLE	MARTIN J. HANLEY	MORRIS GARFINKLE
	(Ind. Nos.)		(Ind. and Count Nos.)	
Nathaniel W. Barber	11,900	11,910	11,896(1)	11,896(2)
Beneficial Finance Co.	11,900	11,910	11,900(1)	11,901(2)
John M. Farrell	11,900	11,910	11,921(1)	11,921(2)
Francis T. Glynn	11,900	11,910	11,966(1)	11,966(2)
Household Finance Corp.	11,900	11,910	11,995(1)	11,995(2)
Liberty Loan Corp.	11,900	11,910	11,997(1)	11,997(2)
James S. Pratt	11,900	11,910	11,998(1)	11,998(2)
Lyle S. Woodcock	11,900	11,910	12,032(1)	12,032(2)

[4654]

Appendix "A"

Part Two

Lists of Public Officials Who Were Defendants, and of Crimes and Indictments on Which Found Guilty or Not Guilty

Defendants	Guilty of requesting bribe on Ind. and count nos.	From whom bribe allegedly requested or accepted	Not guilty of accepting bribe on Ind. and count nos.
Martin J. Hanley:			
	11,976	Francis T. Glynn	----
	11,977	William Heath	----
	11,979	Austin Godshall	----
	11,980	Family Finance Corp.	----
	11,981	State Loan & Finance Co.	----
	11,983(1)	Beneficial Finance Co.	11,983(2)
	11,984(1)	Liberty Loan Corp.	11,984(2)
	11,985(1)	American Investment Co.	11,985(2)
	11,986(1)	Household Finance Corp.	11,986(2)
	11,987(1)	Nathaniel W. Barber	11,987(2)
	11,989	John M. Farrell	----
	11,990	James S. Pratt	----
	11,991	Lyle S. Woodcock	----
	11,992	Gordon Thomasch	----

MORRIS GARFINKLE:

11,923(1)	American Investment Co.	11,923(2)
11,924	Gordon Thomasch	----
11,925	William Heath	----
11,926	Austin Godshall	----
11,927	Francis T. Glynn	----
11,928	Lyle S. Woodcock	----
11,929	James S. Pratt	----
11,930(1)	Household Finance Corp.	11,930(2)
11,931	State Loan & Finance Co.	----
11,932	Family Finance Corp.	----
11,933	John M. Farrell	----
11,935(1)	Nathaniel W. Barber	11,935(2)
11,936(1)	Liberty Loan Corp.	11,936(2)
11,937(1)	Beneficial Finance Co.	11,937(2)

[4655] APPENDIX "B"

DETAILS OF APPROXIMATE PORTIONS OF TRANSCRIPT DEVOTED TO EXAMINATION OF WITNESS WILLIAM F. HEATH BY VARIOUS PARTIES TO CASE.

NAMES OF PARTIES	DATE: 1966	TOTAL PAGES THIS DATE	TOTAL PAGES FOR PARTY
Commonwealth of Massachusetts	Sept. 21	102	
	22	64	
	23	57	
	27	103	
	28	13	
	29	39	
	30	67	
	Oct. 3	34	
	4	54	
	24	4	
	25	6	
	Nov. 4	4	547
Nathaniel W. Barber	Oct. 18	50	
	19	101	
	20	3	
	Nov. 4	4	158
James S. Pratt	Oct. 20	58	
	Nov. 3	3	61
Lyle S. Woodcock	Oct. 20	28	
	21	20	48

Francis T. Glynn	Oct. 21	5	5
John M. Farrell	Oct. 21	34	
	Nov. 3	10	44
Morris Garfinkle	Oct. 21	40	40
Martin J. Hanley	Oct. 24	69	69
Household Finance Corp.	Nov. 3	10	10
Liberty Loan Corp.	Nov. 4	18	
	4	1	19
TOTAL FOR ALL PARTIES:		1,001	1,001
TOTAL FOR COMMONWEALTH		547	
TOTAL FOR ALL DEFENDANTS		454	1,001

APPENDIX F

[Letterhead — LAW OFFICES—FEATHERSTON, HOMANS & KLUBOCK]

November 18, 1971

Honorable G. Joseph Tauro
Chief Justice
Supreme Judicial Court
New Court House
Pemberton Square
Boston, Massachusetts 02108

Re: COMMONWEALTH OF MASSACHUSETTS *vs.* BENEFICIAL FINANCE COMPANY, ET AL

My dear Mr. Chief Justice:

On behalf of Liberty Loan Corporation and Lyle S. Woodcock, we would respectfully request that the Court consider this letter as a Petition For Rehearing in the subject cause, as per custom, on two fundamental issues.

Apparently we did not make sufficiently clear our argument (ps. 47-52 of Consolidated Brief) that *as to us* the evidence of the Commodore meeting could only have resulted in an inchoate agreement. The Court correctly recognized (Opinion p. 110) that "[i]t could hardly be expected that any of the individual defendants would conspire to pay, or would pay, the substantial amount of money here involved . . . out of his own pocket." Therefore, unless the individuals at the Commodore meeting could be found to be authorized by their corporations to make binding agreements, the conspiracy was at best inchoate when the meeting adjourned. The Court met our argument (Opinion ps. 75-76) by referring to that later portion of the opinion which held that there was sufficient evidence that the "participants in the Commodore Hotel meeting had the authority to speak on behalf of their corporations." Even if *arguendo,*

Woodcock had such authority, the evidence was uncontradicted that Heath, Godshall, and Thomasch had none (see p. 48 our Consolidated Brief for transcript citations), and as the Court's opinion recognizes (ps. 48-49) *none of the evidence of the authority of Farrell, Glynn, Barber, or Pratt was ever admitted against Liberty or Woodcock.* As to Woodcock, therefore, on the evidence, the people he was talking to had no authority to make binding agreements. Whatever *other* evidence of the others' authority, the Court could consider *only* the evidence admitted against Woodcock and Liberty, *Commonwealth* v. *Stasiun*, 349 Mass. 38, and that evidence was, as demonstrated, insufficient to warrant a finding that they entered a conspiracy at the Commodore, and that meeting, of course, is their first and last appearance in the case. A directed verdict could be avoided only by considering facts never introduced in evidence against these defendants, and to do so would, of course, be a denial of due process of law.

The Court affirmed the denial of directed verdicts on the substantive indictments by ruling: "One may be convicted as a principal where he delegates to an agent the authority to do the act." (Opinion p. 194). On the previous page of the opinion, however, the Court cited *Commonwealth* v. *French*, 1970 Adv. Sh. 619, its most recent prior opinion in point, yet offered no explanation for the obvious discrepancy between the above ruling and the holding in *French*, where Limone, who initiated the murder and paid an agent (Baron) to commit it *was convicted as an accessory before* the fact, not, as was here required, as a principal. Inescapably, either the Court is now saying that Limone was a principal and not an accessory before the fact or the Court should have recognized that Liberty and Woodcock could not have been convicted as principals. This anomaly violates both the constitutional prohibitions against *ex post facto* laws (a *sub silentio* application of

G.L. (Ter. Ed.) c. 274, § 2 as amended in 1968, see, *Commonwealth* v. *Benjamin*, 1971 Adv. Sh. 141) and denies equal protection of the laws (these defendants were convicted as principals on evidence which heretofore made them only accessories).

The Court is, therefore, respectfully requested to reconsider and rehear the defendants, Liberty Loan Corporation and Lyle S. Woodcock, on these two fundamental issues.

Respectfully yours,

DANIEL F. FEATHERSTON, JR.
45 School Street
Boston, Massachusetts 02108
ROBERT V. MULKERN
332 Main Street
Worcester, Massachusetts 01608

DFF,JR./mi

cc: HONORABLE R. AMMI CUTTER
HONORABLE PAUL C. REARDON
HONORABLE JACOB J. SPIEGEL
HONORABLE ROBERT BROUCHER
JOHN J. CURTIN, JR., Esquire
Special Assistant Attorney General
All Defense Counsel
JOSEPH J. BALLIRO, Esquire
DAVID BERMAN, Esquire

APPENDIX G

[Letterhead — SUPREME JUDICIAL COURT]

November 23, 1971

Daniel F. Featherston, Jr., Esq.
45 School Street
Boston, Massachusetts 02108

Dear Sir:

Your request for rehearing in *Commonwealth* v. *Beneficial Finance Co.* has been considered by the court and is denied.

Yours truly,

(s) R. AMMI CUTTER

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-752

LYLE S. WOODCOCK, ETC.,
PETITIONERS
v.
MASSACHUSETTS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 2, 1972

(s) WILLIAM J. BRENNAN, J.
Associate Justice of the Supreme Court of the United States

Dated this 24 day of January, 1972

APPENDIX I

[Letterhead — LAW OFFICES, FEATHERSTON, HOMANS & KLUBOCK]

January 24, 1972

Honorable R. Ammi Cutter
Associate Justice
Supreme Judicial Court
New Court House
Boston, Massachusetts 02108

Re: COMMONWEALTH OF MASSACHUSETTS *vs.* BENEFICIAL FINANCE COMPANY AND OTHERS
— No. 14,584 and No. 14,585

My dear Mr. Justice Cutter:

Because the court did not in its opinion in the subject cause specifically discuss one issue in a constitutional context, although it was so presented, an ambiguity arises on Liberty Loan Corporation's petition for certiorari to the Supreme Court which is easily remedied. A certificate from the court substantially in the form enclosed would make the record unambiguous and conforms with both the facts and the practice of the Supreme Court. *Lynumn* v. *Illinois*, 368 U.S. 908 (1961), 372 U.S. 528, 535-536; Stern & Gressman, *Supreme Court Practice*, §§ 3.27-3.29 (4th ed. 1969). It is respectfully requested that such a certificate be entered.

In its Decision And Order denying defendants' motions for directed verdicts, the trial court said, relative to the question of corporate criminal liability: "... [T]here is no difference between a case where an individual acts through an agent or intermediary and a case where a corporation does so." (Appendix "A," p. X, I Tr. Vol. 94). My client's main brief, pp. 29-47, argued that the trial judge said one thing yet did another. The Commonwealth's brief, pp. 109-110, 112, then argued for the first time for "treatment of corporations in a manner different from individ-

uals." My reply brief, pp. 8-9, said this concept "would work a denial of equal protection of the laws . . . another unnecessary constitutional error." This court ruled, however, that ". . . we are unconvinced that the standard for imposing criminal responsibility on a human principal adequately deals with the evidentiary problems which are inherent in ascribing the acts of individuals to a corporate entity." Mass. Adv. Sh. (1971) 1367, 1430.

Albeit *sub silentio*, it is clear that a ". . . decision of the federal claim . . . was necessary to the judgment rendered." *Lynumn* v. *Illinois*, 372 U.S. 523, 536 (1963). Other sections of the court's opinion confirm this. Mass. Adv. Sh. (1971) 1367, 1430, 1433, 1438, 1445. Certifying to that fact would assist the Supreme Court and the expeditious resolution of this appeal. None of the other corporate defendants raised this issue in a constitutional context.

Please note that ". . . it is certain at present that a certificate by a non-presiding judge of the state court is valueless . . . . Only the certificate of the state court as such can ever be decisive." Stern & Gressman, *Supreme Court Practice*, pp. 130-131 (4th ed. 1969).

Time restrictions are such that the undersigned would greatly appreciate as early a consideration of this matter as is possible.

Respectfully yours,

DANIEL F. FEATHERSTON, JR.

DFF,JR./mi
Enclosure
cc. HONORABLE JACOB J. SPIEGEL
HONORABLE PAUL C. REARDON
HONORABLE ROBERT BRAUCHER
HONORABLE ROBERT H. QUINN, *Attorney General*
All Other Defense Counsel

APPENDIX J

[Letterhead — SUPREME JUDICIAL COURT]

January 25, 1972

Daniel F. Featherston, Jr., Esq.
Messrs. Featherston, Homans & Klubock
45 School Street
Boston, Massachusetts 02108

Dear Mr. Featherston:

Re: COMMONWEALTH v. BENEFCIAL FINANCE CO.
— Nos. 14,584 & 14,585

Your letter of January 24, 1972, requesting a certificate from this court has been referred to the quorum of the court who heard these appeals. The request has been denied.

Sincerely yours,

(s) R. AMMI CUTTER
Associate Justice

24 1972

In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1115, 71-1122, 71-1241, 71-1251, 71-1253, 71-1254, 71-6428

HOUSEHOLD FINANCE CORPORATION, NATHANIEL W. BARBER and JAMES S. PRATT,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT,
AND RELATED PETITIONS

CONSOLIDATED BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

ROBERT H. QUINN
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In the
Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-1115, 71-1122, 71-1241, 71-1251, 71-1253, 71-1254, 71-6428

HOUSEHOLD FINANCE CORPORATION, NATHANIEL W. BARBER and JAMES S. PRATT,
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v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT,
AND RELATED PETITIONS

CONSOLIDATED BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts, which was rendered on November 4, 1971, is reported in 1971 Massachusetts Advance Sheets beginning at page 1367 and in 275 Northeastern Reporter 2d begin-

ning at page 33. It has been reprinted as an appendix to several of the Petitions.[1]

Jurisdiction

The petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). On January 25, 1972 Mr. Justice Brennan extended the time for filing the petitions to and including March 3, 1972. By order of the Clerk of this Court dated April 24, 1972 the time for filing this Consolidated Brief in Opposition was extended to and including May 24, 1972.

Questions Presented

1. Should this Court review certain matters connected with the indictment of petitioners, including the involvement of a legislative commission, the number of prosecutors present at grand jury proceedings, and the sufficiency of evidence before the grand jury, which matters are not of general importance, when the record shows the return of the indictments were fully consistent with Massachusetts law and Constitutional standards?

2. Should this Court review a decision of the Massachusetts Supreme Judicial Court interpreting Massachusetts statutes concerning jury selection which ruled that those statutes were not violated and which affirmed the ruling of the Trial Court after full hearing that the petitioner's evidence was insufficient to demonstrate that there had been any systematic or intentional exclusion of any group in the community?

---

[1] For convenience of reference, and to avoid duplication, reference to the opinion will be made to the appendix to the Household Petition. Pages of the opinion will be designated by the symbol "App." followed by the appropriate page as appearing in the Household Appendix and in the Massachusetts Advance Sheets.

3. Should this Court review petitioners' claim that their motions for severance were wrongfully denied when the record shows the overwhelming benefits of joinder and joint trials on these unique facts and where trial was conducted in a manner fully consistent with the highest standards of fairness?

4. Should this Court review these convictions because, in accordance with a Uniform Law, the Commonwealth represented and the Trial Court certified, that certain out-of-state witnesses were material to the Commonwealth's case tried before a jury?

5. Should this Court review the sufficiency of the evidence supporting Woodcock's conviction when such a claim turns on individual facts affecting only Woodcock and there was ample evidence that Woodcock conspired with individuals in other corporations to offer bribes to an executive officer of the Commonwealth?

6. Should this Court review the petitioner Liberty's contention that it cannot be convicted of a crime committed for its benefit by its Executive Vice President, where such an issue involves no federal question but rather turns on its own facts and would affect few if any other litigants?

7. Should this Court review a contention that a statute was applied in an ex post facto manner where the trial Court actually did nothing more than apply long standing existing precedent to the facts of this case?

8. Should this Court review convictions in the trials of uniquely complex conspiracies where both trials were conducted with scrupulous attention to the rights of the individual defendants, where the Trial Court strongly instructed the jury to apply the limitations on evidence as it had previously announced them to the jury, where those limitations had been argued to the jury in closing, and where there is no showing that the jury did other than convict on the evidence as limited, because the petitioners

assert that the human mind cannot perform feats of remembering all such limitations and that the Court deferred to the prosecutor?

9. Should this Court review a contention that the mere posing of special questions to a jury is violative of due process of law where it is clear that the jury returned general verdicts as to each of the substantive bribery counts and the answers to the questions demonstrate that the jury was in no way coerced or influenced to bring in guilty verdicts?

10. Should this Court review contentions of prosecutorial misconduct and nondisclosure of evidence in the face of a contrary determination by the Supreme Judicial Court, when such questions turn on their own facts affecting few other litigants and there is ample support in the record for that Court's decision and where the evidence which is claimed to have been withheld is neither exculpatory nor material?

11. Should this Court examine 20,000 pages of transcript to review the evidence which shows two separate prosecutions for two sharply distinct offenses because petitioners rely on the similarities of language in two conspiracy indictments to raise double jeopardy claims in the second trial?

12. Should this Court review the contention of the petitioner Hanley, a lawyer and a member of the Massachusetts Bar, that he was not advised of his right to counsel when the record shows clearly that he was fully so advised?

Statement of the Case

Seven petitions have been filed asking that a writ of certiorari issue to the Supreme Judicial Court of Massachusetts to review the judgment of that court affirming the convictions of the various petitioners for bribery or conspiracy to do so. The petitioners are as follows: No. 71-1241, Household Finance Corporation, Nathaniel W.

Barber and James S. Pratt (hereafter referred to as "Household Petition"); No. 71-1122, Beneficial Finance Co. and Edward R. Newhall (hereafter referred to as "Beneficial Petition"); No. 71-1115, John M. Farrell and Francis T. Glynn (hereafter referred to as "Farrell Petition"); No. 71-1254, Liberty Loan Corporation (hereafter referred to as "Liberty Petition"); No. 71-1253, Lyle S. Woodcock (hereafter referred to as "Woodcock Petition"); No. 71-1251, Local Finance Corporation (hereafter referred to as "Local Petition") and No. 71-6428, Martin J. Hanley (hereafter referred to as "Hanley Petition").

These petitions arise out of two separate series of indictments and two separate jury trials.[2] Beneficial Finance Company (Beneficial), Household Finance Corporation (Household), Liberty Loan Corporation (Liberty), John M. Farrell (a "public relations man" for Beneficial and an officer of one of its subsidiaries), Francis T. Glynn (a "public relations man" for Beneficial, and an employee of one of its subsidiaries), Nathaniel W. Barber, (a "public relations" employee of Household), James S. Pratt (also a "public relations" employee of Household), Lyle S. Woodcock (an Executive Vice President of Liberty), Morris Garfinkle (a member of the Massachusetts Small Loans Regulatory Board) and Martin J. Hanley (Deputy Commissioner Banks and Supervisor of Loan Agencies of the Commonwealth of Massachusetts) were convicted in the first trial. The defendants convicted in the second trial were Local Finance Corporation (Local), Household, Beneficial, Hanley, Farrell, Glynn, Barber,

---

[2] The symbols "IR", "IIR", "P.T.Tr.", "I Tr." "II Tr." and "Post Tr." preceded by the appropriate volume number and followed by the appropriate page number refer respectively to the Record in the first and second trials and to the transcripts in pretrial proceedings, the first trial, the second trial and the post trial proceedings in the first trial. Exhibits are described by the appropriate symbol followed by an exhibit number.

Pratt and Edward R. Newhall (another Beneficial "public relations man", also employed by a Beneficial subsidiary).

In each case the various defendants were charged under indictments returned in 1964 by a special grand jury. The indictments were presented as the result of an investigation developed by the Massachusetts Crime Commission (Commission), a body created by the General Court of the Commonwealth "to investigate and study as a basis for legislative action the existence and extent of organized crime within the Commonwealth and corrupt practices in government at state and local levels." Massachusetts Resolves of 1962, c. 146 (1962) (App. 1368).

These cases, commonly known as the "small loans" trials, are believed to be the longest and most time consuming in Massachusetts' history. Petitioners' pretrial motions were heard for sixty-five court days and span 4,370 transcript pages. The decisions by the Trial Court on these motions cover about 700 pages. Forty-nine of the indictments were grouped for the first trial, which began on July 18, 1966 and lasted about five months. The defendants took 1916 exceptions to rulings by the Trial Court. The transcript of evidence in the first trial consists of 103 volumes containing more than 7,500 pages and the Record of pleadings, motions and decisions in the first trial fills 18 bound volumes. The second trial, involving 21 indictments, began on July 17, 1967 and took up 222 trial days over a period of twelve months. The defendants took 2431 exceptions to rulings by the Trial Court. The transcript consists of 223 volumes containing more than 11,800 pages. The Record of pleadings, motions and decisions in the second trial fills 19 bound volumes. The findings, rulings and decisions of the trial judge in all proceedings connected with these cases contain more than 1400 printed pages (App. 1368-1369). The Supreme Judicial Court devoted two complete hearing days to the oral argument of these

cases and delivered a careful opinion, meticulously covering and disposing of the points raised by petitioners.

From this exhaustive working out of the judicial process petitioners have culled the twelve points which are discussed below. All these contentions are collateral to the central evidence at the trials, some are supported by fragments of testimony lifted out of the context of extensive and detailed examination, and others are without support in the transcript and record itself. Compare Household Petition, 4, 23 with P.T. Tr. 1966-1981.

I. The First Trial

The evidence at the first trial demonstrated that Beneficial, Household, and Liberty, all of which were licensed small loan companies in the Commonwealth, together with certain of their officers and employees (some of whom were defendants) conspired to bribe Hanley and Garfinkle who were public officials with power to affect the companies' interest rates for "small loans". The purpose of the conspiracy and the bribe was to fix the results of the 1962 hearings before the Small Loans Regulatory Board (Rate Board), in order to maintain high interest rates for regulated small loans (App. 1369).

In 1962 Beneficial, Household, Liberty, and American Investment Company of Illinois (American) were actively engaged in making "small loans" in Massachusetts at rates established by the Rate Board. The petitioner Glynn was then the "Director of Industry Relations" for the Beneficial Finance "System" and formally an employee of one of Beneficial's subsidiaries, Beneficial Management. The defendant Farrell was a vice-president of Beneficial Management, to whom Glynn reported. Pratt was the New England "Regional Director of Public Relations" for Household, and Barber, who was also engaged in public relations work for Household, was Pratt's superior. Woodcock was an Executive Vice President of Liberty. Amer-

ican, doing business in Massachusetts as Public Finance Corporation (Public), had as its New England Regional Director William F. Heath (Heath). Heath was a principal witness for the Commonwealth (App. 1398-1400).

Hanley, a lawyer, was the Commonwealth's Deputy Commissioner of Banks and Supervisor of Loan Agencies. During the summer of 1962 Hanley met with Glynn and Heath three or four times in various restaurants to discuss the upcoming hearings before the Rate Board, and whether to pay money to Hanley to insure a favorable result from the Rate Board. At these meetings Hanley insisted upon handling all aspects of this bribery "program". Heath and Glynn met with Pratt at Purcell's restaurant, and all agreed to recommend the payment of bribes to Hanley and to one or more members of the Rate Board (App. 1400-1403).

At a meeting at the Commodore Hotel in New York, on October 17, 1962, Glynn and Farrell of Beneficial, Pratt and Barber of Household, Woodcock of Liberty, Heath of American and several other persons were present. Glynn recommended the payment of bribes to Hanley and others to insure a favorable result at the Rate Board hearings. Woodcock, Farrell, Glynn, Pratt, Barber and Heath, agreed to offer the bribes, and further agreed that Barber should "handle" the bribery "program" with Hanley (App. 1404-1407).

During subsequent months negotiations were carried on with Hanley regarding the amount of the bribes and Morris Garfinkle, a member of the Rate Board, emerged as one of the members of the Rate Board who would receive a bribe through Hanley (App. 1406-1409).

At the Rate Board hearings in November, 1962 Hanley purported to act on behalf of the Department of Banking. The Rate Board hearings were terminated without changing the existing interest rate. The Chairman of the Board publicly stated that this was done at the request of Mr. Hanley (App. 1408, 1410).

There was further evidence regarding the payment of the money to Hanley, including a statement by Barber to Heath that $25,000 had been paid (App. 1411).[3]

On December 18, 1966 Hanley and Garfinkle were each found guilty of 14 counts of requesting bribes, and also of conspiracy to request bribes. Beneficial, Household, Liberty, Woodcock, Farrell, Glynn, Barber and Pratt were found guilty on the same date of conspiracy to offer bribes to Hanley and Garfinkle and of actually offering bribes to Hanley and Garfinkle.[4]

II. The Second Trial.

The evidence presented at the second trial showed that over a period of some seven years (1957-1963) a number of small loan companies, including Household, Beneficial and Local, together with a number of their officers and employees, including Barber, Pratt, Glynn, Farrell and Newhall (another Beneficial "public relations man") conspired to bribe Hanley and that Hanley requested and accepted these bribes. Hanley, by virtue of his office as Deputy Commissioner of Banks and Supervisor of Loan Agencies, had extensive powers to approve or disapprove the activities of small loan companies. Bribes were paid to Hanley during this period to induce him to approve various requests pertaining to routine matters, to induce him to refrain from taking action adverse to the defendants and certain co-conspirators at rate hearings held during 1957, and to obtain various changes in small loan regulations. Unlike the first trial, which centered around one particular event — the payment of money to fix the 1962 Rate hearings — the second trial involved continued payments to Hanley, pursuant to a common scheme, to

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[3] The facts in the first trial are set forth in detail at App. 1398-1411.

[4] In response to special questions propounded by the Trial Court the jury found that the bribe money had never actually been paid (1102 Tr. 7419-7485).

induce him to bestow a variety of favors on the small loan companies (App. 1369-1370).

Heath and one Louis Schwartz (Schwartz), president of Community Finance Company, were important witnesses for the Commonwealth in the second trial. Hanley asked Heath and Schwartz in the summer of 1957 for a bribe in connection with upcoming rate hearings during that year. Schwartz, Newhall of Beneficial, Lerch (a high level employee of Household), Redfield (Heath's superior at American) and others met, and Schwartz relayed Hanley's request. Newhall stated "[W]e'll work something out" (App. 1493-1495).

Newhall later told Schwartz that Newhall was working on the matter and that Schwartz's assessment would be $2,000 payable in installments over a two year period. Newhall gave Schwartz $2,000 to be given to Hanley, and Local's president, one McHenry left an envelope with Schwartz to be delivered to Hanley. In July 1957 Schwartz delivered the bribes to Hanley, together with a $500 payment of his own (App. 1495-1498).

At a meeting in New York City in late 1959 or early 1960, attended by Farrell and Glynn of Beneficial, Lerch of Household, Redfield of American and others, Lerch, Farrell and Redfield stated that they were in favor of expanding the Hanley bribery "program" and changing the allocation of payments among the companies. Subsequent to this meeting the payments to Hanley were reallocated, and the range of favors granted was expanded to include a large number of routine matters. The evidence includes numerous conversations between Hanley and various of the conspirators and among various of the conspirators themselves throughout the seven year period as to the manner of making payments, the timing, amount and allocation of payments and the favors to be granted by Hanley in return for the payments. A large number of

bribe payments were made to Hanley pursuant to the conspiracy. (App. 1498-1514).[5]

On June 10, 1968 Hanley was found guilty on thirty-nine counts of requesting or accepting bribes and Beneficial, Household, Local, Newhall, Farrell, Glynn, Barber and Pratt were found guilty of conspiracy to offer bribes to Hanley.

Reasons for Denying the Writ

I. THERE WAS NO VIOLATION OF DUE PROCESS OR EQUAL PROTECTION IN CONNECTION WITH THE INDICTMENTS.

Beneficial argues at pages 27-31 of its petition that the procurement of the indictments violated its due process rights. Household argues, at pages 36-39 of its petition, that the same process involved a denial of equal protection.[6]

Household asserts, on page 37 of its petition, that "... it was the Massachusetts legislature which secured the indictments of Crime Commission defendants", thus depriving them of the right to indictment by a grand jury in the ordinary course. The opinion below at App. 1371-1373, adopts detailed findings by the Trial Court that the Crime Commission only performed its assigned legislative task of investigation and turned its evidence over to the Attorney General for his review and action. The Attorney General had complete discretion as to prosecution. As an actual matter of fact, found by the Trial Court, Household's contention is erroneous, and raises no federal question.

Marshall Simonds, who investigated these cases for the Crime Commission, was appointed a Special Assistant Attorney General for the purpose of assisting in the presentation of these cases to the Grand Jury. Household and Beneficial argue that performance of this dual role was

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[5] This evidence is set forth in detail at App. 1488-1514.

[6] Woodcock and Liberty each adopt these arguments of Beneficial and Household. (Woodcock Petition, 2 fn.2). (Liberty Petition, 2 fn.1).

improper. (Household Petition, 37-39; Beneficial Petition, 31). However the Trial Court expressly found that Simonds acted under the full control of the Attorney General, that the presentation of evidence was under the supervision of Mr. Travers, an Assistant Attorney General, and that Mr. Simonds' role was only to assist to the degree required by Mr. Travers. Household's statement that Simonds "headed a team which ... handled the interrogation of all witnesses before the grand jury" (Household Petition, 37) is utterly inconsistent with the facts expressly found below. As the Supreme Judicial Court points out at App. 1373-1374, 1377-1378, control of prosecution was at all times in the Attorney General, and Simonds' role was fully consistent with Massachusetts practice and raises no issue appropriate for review by this Court.[7]

Household and Beneficial argue that the number of prosecutors appearing before the grand jury was improper (Household Petition, 38; Beneficial Petition, 27-31). In so doing they ignore the finding of fact by the Trial Court that:

> the number of prosecutors present before the Special Grand Jury at any one time during its hearings, deliberations and voting was no greater than was necessary. All of the prosecutors who were thus present were there in their official capacities, discharging their public duties in connection with this case, and their presence before the Special Grand Jury was necessary at all times when they were present.

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[7] It should be noted that on page 38 of its petition Household distorts the meaning of Mass. Gen. Laws, ch. 12 §30, which prohibits public prosecutors from receiving compensation from private "prosecutors" or complainants. It is apparent that this statute is directed at private, rather than public bodies. Further, the trial court specifically found that the Crime Commission was not the "prosecutor" here (App. 1372).

The Trial Court further found that the grand jurors were not intimidated, coerced, or influenced by the presence of several prosecutors (App. 1374-1375). These findings and the opinion of the Supreme Judicial Court clearly establish that the necessary presence of several prosecutors was consistent with Massachusetts practice and involved no deprivation of equal protection or due process (App. 1374-1376, 1377).

The argument is made by Household and Beneficial that the prosecutor attempted to influence the deliberation of the grand jurors and that the prosecutor otherwise violated his duty of impartiality (Household Petition, 35-39; Beneficial Petition, 27-30). The short answer to this contention is the finding of fact by the Trial Court, not referred to by the petitioners, that there was no such misconduct by the prosecutors (App. 1375), and the opinion of the Supreme Judicial Court that this finding is correct as matter of law (App. 1376).

At pages 37-38 of its petition Household claims that Simonds violated the secrecy of the grand jury proceeding by "massive instances" of improper disclosure to Crime Commission personnel. In so doing Household ignores the detailed decision containing findings of fact and rulings of law made on this point by the Trial Court (I 18R 4218-4238; II 36R 12811-12824). In this decision the Trial Court, after hearing evidence, ruled that all of the Pleas in Abatement alleging improper disclosure were not seasonably filed, if seasonably filed were overruled as not legally sufficient, and if seasonably filed and legally sufficient were disproved on the evidence and therefore denied.

Finally, Household contends that it was improper for a special grand jury to sit at the same time as a regular grand jury sitting in the same county. As the opinion of the Supreme Judicial Court points out, this is perfectly appro-

priate as a matter of Massachusetts procedure (App. 1378).[8]

In summary, none of the issues raised by Household and Beneficial show any violation of Massachusetts law or any deprivation of due process or equal protection. No question which warrants the granting of the petitions has been raised, particularly since the issues would affect few other litigants.

Liberty and Woodcock claim that there was error of constitutional proportions in the denial of their Motions for Leave to file Motions to Dismiss (Woodcock Petition, 13-21; Liberty Petition, 2 n.1). These motions asserted that there was insufficient evidence before the grand jury to warrant the petitioners' indictment. This contention was based on the testimony of Heath contained in a portion of the grand jury transcript which had been made available to the petitioners shortly before filing their motions. At the hearing on these motions petitioners submitted a stipulation of the Commonwealth stating that to the best of the Commonwealth's knowledge this portion was the only testimony relating these defendants to the events occurring on October 17, 1962. It further stated that "[t]he Commonwealth does not recall any other grand jury witness to any talk with Lyle S. Woodcock other than William F. Heath, either before or after October 17, 1962, relative to the matters on trial" (App. 1396).

The Trial Court ruled that these motions were not timely, and that there was insufficient reason to justify discretionary late filing.

This Court has held, on a number of occasions, that it will not look behind an indictment. *Lawn* v. *United States*, 355 U.S. 339, 349 (1958) reh. denied 355 U.S. 967 (1958).

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[8] In footnote 46, at page 31 of its petition, Beneficial asserts that there was improper questioning of talesmen prior to their selection as jurors. This question is covered in detail at App. 1382-1386, and, as appears fully therein, no violation of Massachusetts law or due process is involved.

Costello v. *United States*, 350 U.S. 359, 363 (1956), reh. denied 351 U.S. 904 (1956). *Holt* v. *United States*, 218 U.S. 245, 248 (1910). Here there is no substantial and unsettled question. Rather, there is a question which, while slightly different in its facts from prior cases, falls squarely within the principles enunciated by this Court on at least three prior occasions. Further, as the Supreme Judicial Court points out at App. 1397, the stipulation on which petitioners rely does not exclude the possibility that there was other evidence before the grand jury or inferences from such evidence bearing on these indictments.

Woodcock and Liberty's contentions raise no substantial and unsettled questions and were not properly raised below. For these reasons they provide no ground for the issuance of the writ particularly since they affect only these litigants.

II. The Process of Selecting the Grand Jury and the Petit Jury in Both Trials Did Not Violate Petitioners' Constitutional Rights.

Petitioners assert that the Massachusetts statute governing jury selection was intentionally and massively violated. (Household Petition, 25). They further assert that the composition of the grand jury and trial juries selected differed significantly from the composition of juries which would have been produced if the jurors had been selected in accordance with their interpretation of the Massachusetts statute. The petitioners supplement their argument by asserting that blanket exclusions in violation of the Massachusetts statute were made. Finally, they assert that the trial court improperly eliminated statistical evidence which would have demonstrated the unrepresentative character of the juries selected.

The argument is thus fundamentally a boot strap one.

A Massachusetts statute is stated to have been violated. The violation is then characterized as being done "intentionally and massively". The assumed statutory violation is then equated to an error of constitutional dimension by hypothetical comparison of an undetermined group with unspecified population tables. Petitioners give a perfunctory nod to the long standing constitutional test that the method used to select juries need merely produce a representative cross section of the community. Their failure to prove the lack of a representative cross section is glossed over by the assertion of an alleged error by the Trial Court in eliminating what is stated to be clearly admissible statistical evidence.

The linch pin of this argument is the Massachusetts jury selection statute. (Mass. Gen. Laws ch. 234, §§1, 4) The Trial Court made extensive findings of fact at a hearing on petitioners' contentions and the Supreme Judicial Court of Massachusetts carefully considered the question of whether or not the Massachusetts statutes were violated. Contrary to petitioners' contention, the highest court of Massachusetts adopted the Trial Court's ruling that use of the list of registered voters as the source of the names of potential jurors "did not thereby violate the applicable statutes" (App. 1380). The Supreme Judicial Court also specifically found that the exclusions complained of by petitioners did not violate the Massachusetts statutes.

The interpretation of a Massachusetts statute by the highest court of the state is, of course, controlling. *General Trading Co.* v. *State Tax Comm'n*, 322 U.S. 335, 337 (1944), *Sutter Butte Canal Co.* v. *Railroad Comm. of Cal.*, 279 U.S. 125 (1929), *American Ry. Express Co.* v. *Kentucky*, 273 U.S. 269 (1927).

In two places petitioner seeks to buttress his position by referring in quotation marks to the testimony of George Greene given at the hearing held by the trial court. (House-

hold Petition, 4, 23.) The language in quotations does not appear at the page cited nor at any other place in the witness' testimony (P. T. Tr. 1966-1981). The testimony of Mr. Greene, in fact, referred to the experience of the Election Department that the police list contained "many people who for some reason or another do not qualify to become voters, through economic conditions, or some other reason ..." (21 P. T. Tr. 1972). The Trial Court made specific findings as to the reason why the list of registered voters was used rather than the police list (I 18 R. 4271). The court's finding was adopted in the opinion of the Supreme Judicial Court of Massachusetts. "The election board used the voter list in preference to the police list because it felt that if the police list were used 'it would result in a larger number or percentage of those summoned being rejected or eliminated for lack of qualifications to serve as jurors than would be the case if the list of registered voters were used." (App. 1380).

Household further argues that the reduction of the original list from 18,000 to 3,000 was also in violation of the Massachusetts statutes (Household Petition, 25). The Supreme Judicial Court held: "In reducing the list from 18,000 to 3,000, there is no evidence that the election board abused the discretion clearly left to it by the statutory scheme" (App. 1381).

Moving from their untenable premises of statutory violation, Household then asserts that the alleged violation substantially affected the make-up of the grand and petit juries. The basis for this assertion is said to be certain statistical tables prepared by an expert for purposes of this trial. Some of these statistics were concededly based on hearsay evidence of personal interviews and the refusal of the Trial Court to admit them was specifically upheld (App. 1382) Other statistical evidence was admitted by the Trial Court but it found that this evidence was insufficient for specific

findings and this ruling was also upheld. (App. 1382). In short, the Supreme Judicial Court and the Trial Court ruled that "... the defendants have not proved 'that there has been any systematic or intentional exclusion of any economic, social, religious, racial, political, or geographical group in the community' " (App. 1381). Certiorari should not be granted on this ground.

III. There Was No Violation of Constitutional Provisions in the Denial of the Motions for Severance Filed by Various Petitioners.

Local and Woodcock[9] assert that the denial of their motions for severance constituted a denial of due process (Local Petition, 9-15; Woodcock Petition, 21-26). This issue is discussed in the opinion below at App. 1386-1391.[10]

The first ground upon which petitioners make this contention is that the joinder of indictments gave the prosecution an unfair tactical advantage. The Petition of Local is uniquely a re-digest of the facts. It points out that a substantial amount of prejudicial evidence was necessarily presented to the jury which was not admitted as to it, and claims that this constitutes unfairness. It is well-established, however, that this is not alone enough to compel severance. *Caton* v. *United States*, 407 F.2d 367, 372 (8th Cir. 1969), cert. denied 395 U.S. 984 (1969). *Katz* v. *United States*, 321 F.2d 7, 8 (1st Cir. 1963) cert. denied 375 U.S. 903 (1963). Neither does the second ground asserted by the petitioners—that the defenses of certain co-defendants were antagonistic—alone warrant severance. *Dauer* v. *United*

[9] Liberty adopts all of Woodcock's arguments. (Liberty Petition, p.2 fn. 1).

[10] Forty-nine indictments involving 16 defendants were joined at the first trial, including both conspiracy and substantive bribery charges. In the second trial 21 indictments were joined, involving 15 defendants, also including both conspiracy and substantive bribery charges (App. 1387).

States, 189 F.2d 343, 344 (10th Cir. 1951), *cert. denied* 342 U.S. 898 (1951). *Commonwealth* v. *Millen*, 289 Mass. 441, 459-460 (1935), *cert. denied* 295 U.S. 765 (1935). Woodcock's contention that he was deprived of his right to call co-defendants as witnesses also fails to meet the test. See *Gorin* v. *United States*, 313 F.2d 641, 645-646 (1st Cir. 1963), *cert. denied* 374 U.S. (1963).[11] The proper test is whether there has been a clear abuse of discretion—it must clearly appear that the defendant would not receive a fair trial without a severance when all the circumstances are considered in the light of sound judicial discretion and common sense. *Johnson* v. *United States*, 356 F.2d 680, 682 (8th Cir. 1966), *cert. denied* 385 U.S. 857 (1966). *Baker* v. *United States*, 329 F.2d 786, 787 (10th Cir. 1964), *cert. denied* 379 U.S. 853 (1964).

In the present case the Commonwealth, in seeking joinder in the first trial, relied on the fact that the indictments involved the same basic transaction, with a near coincidence of dates, and the same witnesses, with a logical nexus between the witnesses and defendants, and that grouping the indictments would provide a workable and not unduly long trial, avoiding unnecessary complexity and hardship to the defendants.

The Supreme Judicial Court pointed out that similar grounds could have been given to support the second trial grouping, and stated at App. 1391 that:

> Weighing these considerations against the disadvantages to the defendants arising from joinder, from the point of view of the judge when he decided to grant

[11] Woodcock and Local's contention that they were deprived of the right to cross-examine co-defendants in violation of the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968) is effectively disposed of by the language of the *Bruton* opinion itself, which refused to extend its exclusionary rule to recognized exceptions to the hearsay rule, such as statements of co-conspirators in furtherance of a conspiracy, 391 U.S. at 128 fn.3.

> the Commonwealth's motions, and even in the light of hindsight, we believe that the defendants have not demonstrated sufficient prejudice to them to override the overwhelming benefits of joinder. There was no abuse of the judge's discretion.

It is submitted that this conclusion is correct and that there was no abuse of discretion by the Trial Court and no denial of due process in refusing to fragment trials of such length.

IV. Petitioners Were Accorded Due Process of Law by the Manner in Which the Trial Court Dealt With the Commonwealth's Applications for Issuance of Process to Out-of-State Witnesses.

Farrell, Glynn and Hanley maintain they were denied due process of law when, during the first trial, the Trial Court held an ex parte hearing on the Commonwealth's applications for out-of-state process and, after receiving the representations of the Commonwealth, issued the certificate of materiality contemplated by Mass. Gen. Laws ch. 233, §13A. Farrell and Glynn petition, 13-16; Hanley petition, 10-11.

It is to be noted here that the Trial Court did nothing more than discharge its duty under the statute.[12] It certified only that J. Miller Redfield was a material witness within the terms of G.L. c. 233, §13B, and its finding was entirely neutral as respects petitioners' guilt or innocence. The

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[12] Massachusetts General Laws ch. 233, §§13A-13D, is the Uniform Law To Secure the Attendance of Witnesses From Without the State in Criminal Proceedings. The constitutionality of this statute was upheld in *New York* v. *O'Neill*, 359 U.S. 1 (1958) (Frankfurter, J.). It has been held that the hearing on whether to request the attendance of an out-of-state witness is not criminal in nature and does not infringe on a defendant's right to confront the witnesses against him. See *Epstein* v. *People*, 157 So. 2d 705 (Fla. App. 1963).

certificate cannot possibly be construed as a finding adverse to petitioners and they appear not to assert such a claim here.

The sole question they raise is whether the procedure followed here was so inherently prejudicial as to have denied them due process of law. There is no authority for such a proposition and petitioners cite none. Petitioners infer that the Trial Court was biased against them by virtue of the Commonwealth's representations made at this ex parte hearing but this is sheer speculation, unsupported and unwarranted. The trial court showed the most scrupulous regard for petitioners' rights throughout the entire one hundred ten volume transcript and nineteen volume record in the first trial. Of equal importance, the motions of the Commonwealth to secure the attendance of out-of-state witnesses did not even *mention or refer to* Liberty or Woodcock and it is not possible to draw any inference of their criminality from these motions. I 6 R 1603-1605, 1699-1701, I 7 R 1739-1754, 1762-1773.[13]

The limited representations necessary to establish the need for an out-of-state witness are hardly of the same character as the ex parte relation by the prosecutor of "an episode of sordid behavior" by the defendant in a kidnapping case to the judge who was to pronounce sentence. This was condemned in *Haller* v. *Robbins*, 409 F.2d 857, 859 (1st Cir. 1969). Nor is this a case of violation of rules of criminal procedure limiting what a judge may review during the course of a criminal trial. See *Gregg* v. *United States*, 394 U.S. 489, 492 (1968). In contrast, the Commonwealth's representations here were required by the statutory scheme and went only to the limited question of securing out-of-state witnesses to testify to facts which were for the jury

[13] While Hanley's name was mentioned in certain of these motions, the trial court made no finding whatsoever naming him in its certificates of materiality.

and not the Trial Court to determine. The jury, of course, did not hear these representations and could not have been biased by them.[14] If representations such as these were here to be condemned, no prosecutor could even make an offer of proof during the course of a criminal trial. The petitioners were not prejudiced by the actions of the Trial Court. Certiorari ought not be granted on this ground.

V. There Was Sufficient Evidence to Warrant the Conviction of Woodcock.

Woodcock argues that there was no evidence admitted against him of the authority of the other conspirators to enter into the conspiracy to bribe Hanley and Garfinkle. Absent such evidence, he maintains his conviction of conspiracy is without due process of law. Woodcock petition, 32-33.

This argument does not withstand analysis. It is clear from evidence admitted against Woodcock that as Executive Vice President of Liberty he attended the conspiratorial meeting at the Commodore Hotel. I 50 Tr. 3592. There Glynn told the others that Hanley would handle the Rate Board "program" and would obtain the necessary votes to achieve the rate desired by the conspirators. I 52 Tr. 3748. No one dissented from this scheme—the conspirators only concern was that the amount of the bribe sought by Hanley was excessive. I 52 Tr. 3751-3760. Then Woodcock pegged the amount of the bribe at $25,000 (I 52 Tr. 3761), the other conspirators agreed to pay this amount to Hanley (I 52 Tr. 3762), and the discussion shifted to a consideration of the manner in which the conspiracy was to be effectuated. I 52 Tr. 3768-3771. At this point the offense of conspiracy was complete—the minds of the conspirators had joined in

[14] Petitioners contend that the procedure followed here would be improper in a judge tried case. Whatever the merits of this contention, it is not presented by this case.

agreement to violate the law. As stated in *Commonwealth* v. *Judd*, 2 Mass. 329, 337 (1807) "the offense is complete when the conspiracy is made."

Woodcock's contention that evidence of the corporate authority of the other conspirators was not admitted against him does not operate to void his conviction since it is patently obvious that the other conspirators at the Commodore meeting—Barber, Pratt, Farrell, Glynn, and Heath—all had the *individual* capacity to agree with Woodcock to bribe Hanley and this is what they did. Whatever the motives of these individuals to act as they did—possibly advancement in their respective corporate hierarchies, reciprocal favors from Hanley, or the like—their own individual roles in the conspiracy are not reduced simply because their agreement and acts tended to benefit their corporate employers. There is ample evidence that Woodcock mutually agreed with these other individuals to bribe Hanley and Garfinkle. This evidence is sufficient to support the conspiracy conviction. Certiorari ought not be granted on this ground, particularly where only one litigant is affected.

VI. The Sufficiency of the Evidence of Liberty's Corporate Criminal Responsibility Raises No Federal Question.

At pages 7 through 10 of its petition Liberty contends that it is a denial of equal protection to convict a corporate defendant of a serious crime on the basis of acts by its Executive Vice President committed on behalf of the corporation. The proper standard of corporate criminal responsibility, the necessary difference between treatment of corporate and individual crime, the strong public policy reasons for such differences and the evidence against Liberty are treated in detail at App. 1418-1450. A consideration of the opinion below demonstrates clearly that

this contention by Liberty raises no substantial question for review by this Court.

VII. Woodcock's Conviction as a Principal on the Indictment Charging Him With Bribery Was Based on the Settled Common Law of the Commonwealth and not Upon an Ex Post Facto Application of Mass. Gen. Laws ch. 274, §2.

Woodcock and the other co-conspirators in the first trial specifically delegated to Barber the authority to offer a bribe to Hanley. App. 1405-1407, 1487. The Supreme Judicial Court affirmed Woodcock's conviction of the crime of bribery, holding at 1487: "One may be convicted as a principal where he delegates to an agent the authority to do the act." Since this doctrine was expressly incorporated into a statute passed subsequent to his trial—Mass. Gen. Laws ch. 274, §2, as amended by St. 1968, c. 206, §1, effective July 30, 1968—Woodcock argues that the Supreme Judicial Court must have applied that statute to him in an ex post facto manner. Woodcock petition, 34-37.

This argument is quite artificial since the Supreme Judicial Court nowhere relies on this statute as a basis for Woodcock's liability and, as Woodcock himself admits (Woodcock petition, 37), the Commonwealth never suggested that the new statute should apply. The fatal flaw to this argument lies in the fact that the Supreme Judicial Court, in its decision below, merely restated what had long been the law of the Commonwealth with respect to bribery indictments. Thirty years before the Supreme Judicial Court's decision in the instant case, it had dealt explicitly with these same contentions:

> The defendant contends that since he was not present in any sense when the various payments were

> made, nor . . . when there was talk of paying money for jobs, he could have been nothing more than an accessory to the felony of which he was convicted as a principal. . . . The interposition by a public officer of an agent or "bagman" (to use the popular expression) as a screen against those who voluntarily or under some compulsion are disposed to bribe him, does not reduce him to an accessory. . . . The request or the acceptance may be by an authorized agent; or the acceptance by the public officer may be an acceptance from an intermediary without the knowledge of the person making the gift or gratuity. *Commonwealth* v. *Connolly*, 308 Mass. 481, 489-490 (1941).

The *Connolly* case arose under Mass. Gen. Laws ch. 268, §8 (requesting or accepting a bribe). The particular indictment here arises under Mass. Gen. Laws ch. 268, §7 (offering or giving a bribe). As the Trial Court noted in denying Woodcock's motion for a directed verdict on this indictment:

> Is there any sound or valid reason why both sides to an alleged bribe (the public officer allegedly requesting or accepting it and the other person or corporation allegedly giving, offering or promising it) should not stand on the same footing on the question of whether or not they may be convicted as principals when they commit the crime through agents or intermediaries? I 94 Tr. "Appendix A," vii.

There is, of course, no viable distinction which can be drawn between the public official who solicits a bribe and the individuals and corporations offering to pay it. Woodcock never attempted to draw such a distinction below and the Supreme Judicial Court merely enunciated again a general principal (which had previously been applied to

a cognate statute), applying it to Mass. Gen. Laws ch. 268, §7.[15] There is no question here presented as to the ex post facto application of a statute and certiorari ought not be granted on this ground.

VIII. Petitioners Were Accorded Due Process of Law by the Manner in Which the Changes in Limitations on Evidence Were Effected.

The trial court's practice of placing limitations on evidence during these trials and then changing these limitations after a preliminary finding of conspiracy in each case is well established in Massachusetts. *Commonwealth* v. *Benesch*, 290 Mass. 125, 132-133 (1935). *Commonwealth* v. *French*, Mass. Adv. Sh. (1970) 619, 637, fn. 27. *Commonwealth* v. *Rogers*, 181 Mass. 184, 191 (1902). Even so, Beneficial, Houshold, Local, and Woodcock (with whom Liberty joins) argue that the number of limitations was so great that the jury could not have remembered them all and must necessarily has disregarded the limitations in finding petitioners guilty. Beneficial petition, 11-17; Household petition, 27-32; Local petition, 9-15; Woodcock petition, 21-26. Farrell, Glynn, and Hanley contend that the trial court permitted the prosecutor to determine the final application of the evidence. Farrell and Glynn petition, 16-20; Hanley petition, 12.

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[15] The reliance by Petitioner on *Dolan* v. *Commonwealth*, 304 Mass. 325, 339 (1939) (Woodcock petition, 35-36) does not weaken this argument. The *Dolan* case involved criminal contempt—a serious affront to the judicial system by virtue of jury tampering. See 325 Mass. at 304. The Supreme Judicial Court's citation is preceded by the signal "see" which indicates that the conclusion of the court will be suggested by an examination of the case rather than that its conclusion is stated by the *Dolan* case. A Uniform System of Citation (11th Ed.) §26.15, p. 87. It is thus of no moment that the *Dolan* case may technically have involved a misdemeanor. The point being made by the Supreme Judicial Court was not so restrictive.

A. *Petitioners Are Not Entitled To A New Trial Simply Because The Limitations Upon Evidence Were Numerous, Especially Where There Is No Showing That The Jury Disregarded The Limitations On Evidence Critical To Sustain Each Particular Conviction.*

Petitioners do not appear to contend that any of the trial court's particular announcements regarding changes were inaccurate or misleading. Nor do they contend that the jury was not given suitably strong instructions to give weight to the limitations.[16] Rather they argue that the number of limitations were so great that no one could have remembered them all and this, in itself, is a denial of due process.

But it must be remembered that neither the limitations and the changes thereto, nor the trial court's charge operated in a vacuum. During the course of these trials petitioners' counsel often sought to have the Commonwealth specify the limitations under which it was offering each particular item of evidence. By changing the limitations in the particularized manner adopted here (rather than admit-

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[16] Note these excerpts from the charge of the Trial Court in the first trial: "Each defendant in this case is to be judged solely on the evidence which was admitted as to him or it as to a particular indictment or count. You cannot consider against a defendant evidence which was admitted only against some other defendant or defendants . . . You cannot charge any defendant with anything disclosed by evidence which was not admitted against him . . . Do not decide the case of these defendants as though all of the evidence applied to all defendants. It does not." I 101 Tr. 7217 - 7220. As the Supreme Judicial Court said, "Implicit in these instructions was the admonition that if the jury could not remember the limitations on a given item of evidence they could not consider it." App. 1476. This inference was made explicit by the Trial Court in its charge at the conclusion of the second trial. "If you find yourselves in a state of mind where you are unable to recall whether particular evidence was or was not admitted as to a particular defendant or count, *then you may not consider that evidence as to that defendant or count.*" II 220 Tr. 11, 599 (emphasis supplied).

ting evidence wholesale against all the conspirators after the preliminary finding of conspiracy) the trial court was, in effect, implementing a "safeguard to individualize each defendant in his relation to the mass." *Kotteakos* v. *United States*, 328 U.S. 750, 773 (1946)—a point apparently conceded by Farrell and Glynn. Farrell and Glynn petition, 19 n. 45. The jury could not fail to note that the evidence against the different petitioners was varied. Then, in their summations, petitioners' counsel carefully and exhaustively called to the jury's attention the limitations on the evidence as it applied to each petitioner. This was followed by the trial court's charge which enjoined the jury to give effect to the limitations and, implicitly in the first trial and explicitly in the second, told them not to consider evidence as to which they could not remember the limitations.[17]

Given this background, it can hardly be thought that the jury did not remember and apply the limitations as to the central items of evidence necessary to warrant petitioners' convictions. These were the elements explained in detail during the closing arguments and as to which the trial court had given lucid and comprehensive instructions. Absent some tenable showing that the jury could not recall these crucial items of evidence as limited (Petitioners have made no such showing whatsoever) certiorari ought not be granted on this ground. "Appellate courts should be slow to impute to juries a disregard of their duties." *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933).

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[17] Household's assertion that it was error not to give an instruction that, unless all the limitations could be remembered as to the evidence against a petitioner he must be acquitted (Household petition, 27-28), is without merit or supporting authority. If it were adopted, Household would be entitled to acquittal upon a showing that the jury did not remember a limitation as to a collateral matter even though the jury might not have relied on that evidence at all in reaching a verdict.

B. *Petitioners Were Accorded Due Process Of Law By The Decision Of The Trial Court With Respect To The Changes In Limitations On Evidence; The Trial Court Did Not Delegate Its Authority To The Prosecutor.*

Farrell, Glynn, and Hanley argue generally that the trial court abdicated its responsibility over evidentiary rulings to the prosecutor. Their argument, however; prescinds from the Decision of the Trial Court on defendants' "Motions to Strike" Evidence made by the Trial Court during the course of the second trial. Farrell & Glynn petition, 16. See II R 13, 127-13,137. There, in a portion of the decision not quoted by petitioners, the trial court stated that in ruling on evidentiary motions "[T]his Court does not feel that it is bound or limited by the Commonwealth's statement of intent or of its 'rule of fairness'... [I]n the absence of... agreement, this Court will rule on Motions to Strike on the basis of what it understands to be the rules of evidence relating to a trial of this kind." II Tr. 13,130. See App. 1478. This is hardly an improper delegation of judicial authority.

Curiously, petitioners appear to be arguing that they were prejudiced by the admission against them of less than the quantum of evidence which might possibly have been admitted against them under the principle of *Commonwealth* v. *Benesch*, 290 Mass. 125, 132-133 (1935). This attempt to whipsaw the judicial process after seeking limitations below was aptly characterized by the Supreme Judicial Court as "patently specious." App. 1478. If petitions had actually been deeply concerned about the careful changes in limitations announced by the Trial Court, they could have assented to the procedure followed in *Commonwealth* v. *Kiernan*, 348 Mass. 29, 57-58 (1964) *cert. denied sub. nom. Gordon* v. *Massachusetts*, 380 U.S. 913 (1965)

where, by request of counsel, all evidence was admitted *de bene* against all defendants subject to a motion to strike. These petitioners can show no prejudice from the procedure followed below. Certiorari ought not be granted on this ground.

IX. The Decision of the Trial Court To Put Special Questions to the Jury Did Not Deny Petitioners Due Process of Law.

In the first trial, the trial court submitted to the jury four special questions as well as the general verdict forms. In each instance, the jury answered these questions as well as returning their general verdict. Beneficial, Household, Farrell, and Glynn argue that this procedure denied them due process of law. Beneficial petition, 24-27; Household petition, 32-36; Farrell and Glynn petition, 20-21. This argument is without merit.

Special questions do not deprive the jury of its constitutional responsibility to find guilt or innocence. Their use in a state court has never been held to deny a defendant due process of law under the United States Constitution. Indeed, the use of special questions in a complex case of this nature would hardly seem to prejudice the defendants. Far from "catechizing" the jury in the instant case, the questions may well be deemed to have assisted them in keeping separate in their minds the different elements of the substantive crimes and the burden of proof of the Commonwealth as to each of those elements.[18] It is simply not true that the special questions "led the jurors down

[18] Beneficial complains that, by virtue of the special questions, "[t]he jury's attention was riveted on a specific crime before it even faced the central question of guilt." Beneficial petition, 27. This is not prejudicial. Of necessity, the jury must focus on the "specific crime" before it determines the "question of guilt." Absent a "specific crime," the "question of guilt" does not arise.

the guilty trail." Instead the jury expressly found that no bribe was paid by these petitioners. In these circumstances it is most appropriate to characterize the special questions as separate road blocks to the return of a guilty verdict—each one having to be negotiated by thoughtful discussion before petitioners could be found guilty.

Special findings have often been used in treason cases, where the jury was requested to state which overt acts were committed in support of its verdict of guilty. *United States* v. *Kawakita,* 96 F. Supp. 824 (S.D.Cal. 1950), *aff'd* 190 F.2d 506 (9th Cir. 1951), *aff'd* 343 U.S. 717 (1952). Mr. Justice Douglas' opinion in *Kawakita* contains a direct reference to special questions. 343 U.S. at 722. See also *Cramer* v. *United States,* 325 U.S. 1, 36 (1945). Special questions have also been employed in conspiracy cases when to do so would aid the court, as where a statutory penalty was varied during the life of the conspiracy. *United States* v. *Haim,* 218 F.Supp. 922 (S.D.N.Y. 1963). *United States* v. *Ogull,* 149 F.Supp. 272 (S.D.N.Y. 1957) *aff'd sub nom. United States* v. *Gernie,* 252 F.2d. 664 (2d. Cir., 1958), *cert. denied* 356 U.S. 968 (1958). See *United States* v. *James,* 432 F.2d 303 (5th Cir. 1970); *United States* v. *Hensley,* 374 F.2d. 341, 344 (6th Cir. 1967) *cert. denied* 388 U.S. 923 (1967).

The cases relied upon by petitioners to demonstrate a supposed dispute among the circuits as to the constitutionality of special questions actually do not have that effect at all. As the First Circuit explicitly noted (and Household, Farrell, and Glynn admit), the court's action in *United States* v. *Spock,* 416 F.2d. 165, 180 (1st Cir. 1969) was based upon the exercise of its supervisory power. The decisions in the Eighth and Ninth Circuits are based on the court's understanding of federal practice and not on the United States Constitution. *Gray* v. *United States,* 174 F.2d. 919,

924 (8th Cir. 1949). *Anderson* v. *United States*, 273 Fed. 677, 679 (9th Cir. 1921). The Third Circuit decision relied on by petitioners, *United States* v. *Noble*, 155 F.2d 315, 317-318 (3d Cir. 1946), concerns itself with failure of the lower court to instruct the jury on the elements of the crime charged and not at all with the propriety of special questions.

There is thus no precedent for the startling assertion that the procedure followed here—a procedure long recognized in the jurisprudence of the Commonwealth of Massachusetts (*Commonwealth* v. *Bartholomew*, 326 Mass. 218, 221 ( )) — denied the petitioners due process of law. Certiorari ought not be granted on the ground that the trial court posed special questions to the jury in the first trial.

X. The Commonwealth Fulfilled Its Duty of Disclosure to the Petitioners and They Are Not Entitled to a New Trial on This Ground.

All petitioners convicted in the "first small loans case" claim that they must be given a new trial on the ground that the Commonwealth failed to disclose material evidence during the course of that trial. See *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). After a three-day hearing following the first trial, the Trial Court denied petitioners' motions for new trial in a 37-page decision which includes meticulous findings of fact as to the various contentions raised. 19 R 4619-4655. The Supreme Judicial Court affirmed. App.

Woodcock and Liberty contend that the Commonwealth made misstatements of fact to them during the course of the trial and that it intentionally suppressed certain of Heath's grand jury testimony (Woodcock petition, 27-31) Beneficial argues that the expense vouchers of the witness Heath, which were not disclosed until the second trial,

were material evidence on the question of whether three incriminating meetings (during which Hanley first solicited a bribe with respect to the 1962 Rate Board proceedings, *supra*, p. 7) took place between Heath, Glynn, and Hanley during the summer of 1962 (Beneficial petition, 17-18).[19] Household restricts its concern to the expense vouchers covering the period of a luncheon meeting at Purcell's restaurant where Glynn, Pratt and Heath agreed to recommend that a bribe be paid to Hanley. *Supra*, pp. 7-8 (Household petition, 10-13). All of these issues turn on their own facts and only affect this case.

Although the trial court found that the Commonwealth acted with full and complete good faith and did not intentionally withhold from the petitioners any material they were entitled to see (I 19 R 4650) and the Supreme Judicial Court found there was sufficient evidence to support these findings (App. 1482), Beneficial, Farrell, Glynn, and Hanley complain that the expense vouchers were intentionally suppressed purusant to a "deal" with Heath. (Beneficial petition 18-20; Farrell & Glynn petition 21-22; Hanley petition 11-12).

To these contentions there are at least three answers: 1) the evidence derived from the grand jury testimony and the expense vouchers is neither exculpatory nor material; 2) the Commonwealth made no misrepresentations or "deals" with respect to this evidence; and 3) under the circumstances of this case, there was no duty constitutionally imposed on the Commonwealth to turn its voluminous files over to the petitioners.

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[19] Woodcock (and Liberty, which adopts Woodcock's petition on this point — Liberty pet. 2, fn. 1) would appear to espouse this same position (Woodcock petition, 31) even though none of the evidence supposedly impeached by the expense vouchers was ever admitted against either Woodcock or Liberty and the Supreme Judicial Court expressly declined to decide whether either had standing. App. 1480.

A. *In The Circumstances Of This Case, There Was No Duty Imposed On The Commonwealth By The Constitution To Make All Its Files Available To The Petitioners; Evidence Not Disclosed Was Not Material.*

Even if possible inferences might be extracted from the grand jury testimony or expense vouchers so as to arrive at some peripheral inconsistency with Heath's testimony during the first trial, the United States Constitution ought not be interpreted to require the Commonwealth, who made a diligent, good faith effort to search out and disclose to the defense all relevant information in its possession (I 19 R 4650), to make a further day-by-day reevaluation of the twenty-four file drawers of documentary materials in its possession (App. 1483) so as to turn over to petitioners everything which, in their eyes, might conceivably be inconsistent with the day's testimony.

A single example will suffice to demonstrate the impossible burden which petitioners seek to cast upon the Commonwealth. Actually, the only possible inconsistency which arises from the variety of evidence cited by petitioners stems from the fact that Heath testified that he had lunch with Glynn and Pratt at one of the many incriminating meetings while his expense vouchers (which, in any event, would not include the names of Glynn and Pratt) list the names of other individuals at lunch during the relevant period. (see discussion *infra* pp. 41-43).

How, then, is the Commonwealth to make the decision as to which documents to turn over to petitioners? At the outset of the trial the Commonwealth possessed twenty-four file cabinet drawers full of documentary materials obtained from the Massachusetts Crime Commission and had developed an additional six drawers of documents during its trial preparation. In its opening, the Commonwealth de-

scribed the meeting at Purcell's but made no mention of the conspirators lunching there. Thus, the Commonwealth cannot be thought to have anticipated any testimony inconsistent with the vouchers in its possession. It was only on the fiftieth day of the first trial that Heath made passing references to lunching at Purcell's with Glynn and Pratt.

Must the Commonwealth, therefore, after fifty days of trial, comb through all its materials again seeking to cull out vouchers which might, in petitioners' eyes, possibly be inconsistent with Heath's testimony as to lunch?[20] Were this Court to promulgate such a standard as the constitutional mandate, prosecutors in every complex case would be virtually required to turn over their entire file to the defendants lest some peripheral inconsistency crop up during the course of a lengthy trial which, if undetected despite the prosecutor's good faith efforts, would vitiate the verdict.[21]

But the United States Constitution does not require imposing any such strained and impossible burden on the prosecutor. For, as Chief Justice Burger pointed out in *Giglio* v. *United States*, — U.S. —, 40 U.S. Law Week 4209, 4211 (1972):

> We do not . . . automatically require a new trial whenever "the combing of the prosecutor's files after the

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[20] It is, of course, not without significance that Heath testified that he met Glynn and Pratt on the day in question "at Haley's restaurant" and they then went over to Purcells. I 50 Tr. 3529. The most plausible inference is that Heath, a public relations man whose business it was to entertain others, had *already* incurred a reimbursible expense at Haley's before going over to Purcell's with Glynn and Pratt.

[21] As Chief Judge Friendly put it in *United States* v. *Keogh*, 391 F.2d. 138, 147 (2d Cir. 1968): "Any lawyer who has prepared and conducted a trial like this one, lasting 23 trial days, knows how easy it is to forget items in his files that an unexpected turn in the evidence has made helpful to his own case, let alone those that might aid his opponents—something which, under our adversary system, is not in the forefront of his mind."

> trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . .'' *United States* v. *Keogh*, 391 F.2d. 138, 148 (2d Cir., 1968). A finding of materiality of the evidence is required under *Brady*.''

Petitioners rely heavily on *Giglio* and invite the court to compare that case with this one. The Commonwealth submits that any such comparison will only confirm the propriety of the decision below.

In *Giglio*, the chief witness for the prosecution, Taliento, perjured himself during the course of the trial by denying the existence of an agreement as to his future prosecution and the Assistant United States Attorney, albeit in good faith, permitted this false evidence to go uncorrected. After the trial, another Assistant United States Attorney admitted that it had been agreed that Taliento would not be prosecuted if he cooperated with the government. This Court, confirming its holding in *Napue* v. *Illinois*, 360 U.S. 264 (1959), reversed and remanded for a new trial.

A far different situation is presented by the case at bar. Here, the Commonwealth has expressly denied the existence of any "deal" (II 199 Tr. 10,439) and the grand jury testimony and documentary evidence relied on by the petitioners is either wholly consistent with the testimony of the Commonwealth's witnesses (*infra*, pp. 38-40, 41-42) or, at worst, not directly inconsistent with any of the testimony at trial (*infra*, pp. 42-43). In such circumstances, as this Court has so recently affirmed, "a finding of materiality of the evidence is required." *Giglio* v. *United States*, —— U.S. ——, 40 U.S. Law Week 4209, 4211 (1972).

The requirement that the evidence on which to base a new trial be "material" was laid down in the *Brady* case itself (383 U.S. 83, 87) and has been uniformly interpreted as requiring the defendant to demonstrate more than

peripheral inconsistencies. *United States* v. *Tomaiolo*, 378 F.2d. 26, 28 (2d Cir. 1967) ("To obtain a new trial a convicted defendant must . . . show more than the suppression of evidence. The evidence must also be shown to be material and *of some substantial use* to the defendant.") (emphasis supplied) *Ingram* v. *Peyton*, 367 F.2d 933, 936 (4th Cir. 1966) (The evidence must be "of a character to raise a *substantial* likelihood . . . that it would have affected the result if known at the trial.") (emphasis supplied) See *Lessard* v. *Dickinson*, 394 F.2d 88 (9th Cir. 1968).[23]

This Court's reliance in *Giglio* on *United States* v. *Keogh*, *supra*, serves to reinforce the point Chief Judge Friendly made in that careful decision.

> Failure to appreciate the use to which the defense could place evidence in the prosecution's hands, or forgetfulness that it exists when a development in the trial has given it new importance, are quite different [from cases where there has been a *specific* request for particular documents]. Since this must happen to the most scrupulous prosecutors and the issue of deterrence scarcely arises, the problems of the courts and the wider interests of society unite to require a substantially higher probability that disclosure of the evidence to the defense would have altered the result. 391 F.2d at 148.

In light of these considerations, the Commonwealth submits that none of the evidence argued by petitioners here to require a new trial was, in fact, material. Petitioners' due process rights were not violated by the Commonwealth. Certiorari ought not be granted on this ground.

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[22] Indeed, the commentary to Section 3.11(a), ABA, Standards Relating To The Prosecution Function And The Defense Function, Approved Draft, 1971, states that even the "area of evidence which would *substantially* aid the defense . . . is too vague to be defined in standards of [prosecutorial] conduct." (emphasis supplied). *A fortiori* then, good faith non-disclosure of minor impeaching evidence ought not be construed to be a violation of due process.

B. *The Grand Jury Testimony In Question Was Not Exculpatory.*

The bits and pieces of grand jury testimony thought by Liberty and Woodcock to be exculpatory are peripheral at best. The petitioners Woodcock and Liberty repeatedly mention Heath's "apparently exculpatory grand jury testimony" (Woodcock petition, 28) yet none of his grand jury testimony bearing on the first trial was in fact exculpatory.[23] Woodcock and Liberty first seek to capitalize (See Woodcock petition, 29) on the fact that certain grand jury testimony which they reviewed during the course of the second trial demonstrates that Heath, during a single day of his grand jury testimony, failed to make reference to Woodcock's presence at the Commodore meeting.[24] Heath did not, during this day's testimony before the grand jury, say anything directly inconsistent with his prior testimony. However, Heath had, in previous testimony before the grand jury, definitely named Woodcock as one of the con-

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[23] The first small loans trial dealt with the "Rate Board program" — a euphemism used by the conspirators to describe their conspiracy to bribe Hanley and others to fix the rates to be charged for "small loans". App. 1402. The second small loans trial dealt with the "Hanley program", App. 1507-1505, a continuing conspiracy to bribe Hanley to bestow various favors on the small loans companies. App. 1488. While it is true that Heath's grand jury testimony (and his subsequent testimony at the second trial) has Woodcock at the Commodore meeting trying to extricate Liberty from the continuing Hanley program, it is equally clear that, at that *same* meeting, Woodcock committed Liberty to participation in the Rate Board conspiracy. Compare App. 1513-1514 with App. 1405. Woodcock's refusal to participate further in the Hanley program does not exculpate him from his explicit affirmation ("the figure [i.e., the bribe] is $25,000 and not one penny more") of the means and goal of the Rate Board conspiracy—the subject of the first trial.

[24] This contention was first made in paragraph 23 of petitioners' affidavit accompanying their motion for new trial I 8R 1971. In paragraph 6 of this *same* affidavit, petitioners themselves quote a portion from Heath's grand jury testimony which establishes that Woodcock was present at the Commodore meeting. I 8R 1963 - 1964. I 19 R4647.

spirators at the Commodore meeting. Were this single omission on one day of extended testimony to be inflated to the status of material exculpatory evidence, the Commonwealth would, in future trials, necessarily require each grand jury witness to repeat the aggregate of all his prior testimony every day. As the Trial Court aptly said, "[I]t is not possible to erect the entire walls of a brick building with each brick." I 19 R4646. Heath's single omission to repeat to the grand jury every item of evidence as to which he had testified can hardly be thought to be genuinely material to the question of the guilty of the petitioners. No new trial ought be granted on this ground.

Next, Liberty and Woodcock argue (Woodcock petition, 31) that Heath's testimony about Woodcock's "blackmail"[25] before the grand jury is inconsistent with his testimony at trial that Woodcock and the other individual defendants "were my friends" (I 66 Tr. 4758) and that he was on cordial terms with the Liberty personnel *in his area*.[26] 19 R 4645. There is, in fact, no inconsistency whatever between Heath's grand jury testimony on these points and his testimony at trial. Moreover, Heath's grand jury testimony on these points exculpates neither Liberty nor Woodcock nor is it material to their defense. Heath carefully testified at trial that the other individual defendants *had been* his friends. I 66 Tr. 4758. He never implied that Woodcock was his friend at the time of trial. Moreover, Woodcock, coming from St. Louis, was not in Heath's area and Heath's testimony about his cordial relations with Liberty personnel in his area did not include Woodcock. 19R 4645-4646. Thus, even

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[25] As the trial court noted, "It is questionable whether Heath's interpretation that he was being blackmailed is correct, or whether the correct interpretation is that he, Heath, was being asked by Woodcock to blackmail the defendant Hanley." I19R 4643.

[26] Woodcock's paraphrase of Heath's testimony omits this limiting phrase. See Woodcock petition, 31. Heath's actual words were, "I was on cordial terms with all of the personnel in my area." 175 Tr. 5345.

these bits and pieces of collateral grand jury testimony culled by petitioners out of context and juxtaposed against specific testimony in a voluminous trial transcript, prove to be neither inconsistent nor material and the fact that they were not available to Liberty and Woodcock during the first trial does not warrant reversal of their convictions.

C. *The Commonwealth Made No Misstatements of Fact to the Petitioners.*

Finally, Woodcock and Liberty contend that the Commonwealth prejudiced their case by representing to them that if they cross examined Heath about the Commodore Hotel meeting "it would result in the evidence of another crime." 19 R 4648. See Woodcock petition, 28-31. Indeed, there *was* ample evidence of other criminal conduct at the Commodore Hotel meeting beyond that tried in the first small loans trial[27] App. 1512-1513. Thus, both the Trial Court and the Supreme Judicial Court concluded that the Commonwealth's statement was perfectly correct, proper, and truthful. Liberty and Woodcock argue on the basis of their directed verdicts of not guilty in the second trial that there was *no* evidence of their criminality introduced at that trial. This overstates the situation. What actually transpired at the Commodore meeting, as the opinion of the Supreme Judicial Court makes clear, is that Woodcock, after emphatically setting the amount of the bribe in the "Rate Board program" (App. 1405) objected when discussion of the on-going "Hanley program" came up later during that same meeting. From Woodcock's statement that "Liberty had no intention of participating in the Hanley

[27] Both the "Rate Board Program"—the conspiracy tried in the first trial, and the "Hanley program" — the conspiracy tried in the second trial, were discussed at the Commodore meeting. See fn. 23, *supra*.

program *this year*'' (App. 1513), (emphasis supplied), a fact finder could reasonably infer that Woodcock, while committing Liberty to the Rate Board conspiracy, was taking Liberty out of the on-going Hanley program.

Equally important, counsel for Woodcock and Liberty had full opportunity to cross examine Heath and Woodcock himself was present throughout the Commodore meeting about which Heath had testified. It must be presumed that Woodcock fully apprised his counsel of the discussions at the Commodore meeting. In these circumstances, factually accurate statements by the Commonwealth can hardly be thought to be misrepresentations which changed defense counsel's trial tactics. Certiorari ought not be granted on this ground.

D. *The Expense Vouchers In Question Were Not Exculpatory.*

Petitioners contend that the expense vouchers are evidence inconsistent with Heath's testimony as to his meetings with various of the other conspirators in Massachusetts. Analysis of the actual facts reveals no inconsistency whatsoever.

It is necessary first to consider the expense vouchers themselves. The vouchers provide spaces for the entry of reimbursible expenses under a separate column for each day of the week and set forth various expense categories for each day including "Breakfast", "Lunch", and "Dinner" (I 19 R 4637). The vouchers were not a complete record of Heath's daily activities but included only records of expenditures for which Heath sought reimbursement from his employer (App. 1481; I 19 R 4638). Meetings with other people are not indicated on the vouchers unless Heath spent money on the meal of someone else and sought reimbursement therefor (I 19 R 4638). Heath's own meals in Boston were not reimbursible and, more important, he had

been explicitly instructed "that he should not include the names of any public relations men for other companies on his expense vouchers" (I 19 R 4638).

There is thus no inconsistency between the limited information recited on the expense vouchers and Heath's testimony as to his three meetings with Glynn and Hanley in the summer of 1962. Glynn was a public relations man for another company (I 47 Tr. 3352) so Heath would not have recorded his name on the expense vouchers in any event. Nor were the three meetings with Hanley and Glynn during which Hanley first solicited a bribe, "social occasions" where Heath would pay, and thus might be expected to seek reimbursement for, a pro-rata share of Hanley's expenses (I 19 R 4639-4641). See I 48 Tr. 3440, 3448, 3450-3451. Finally, the fact the expense vouchers show Heath having lunch or dinner with persons other than Hanley and Glynn during the summer of 1962 is not inconsistent with his testimony at trial since Heath never testified that these three meetings with Hanley and Glynn were luncheon or dinner meetings (See I 50 Tr. 3518-3525) while there was ample testimony that Heath often met them casually for a drink (See e.g., I 54 Tr. 3914).

In short, there was no testimony at trial from which it might even be *inferred* that Heath, as a result of his midsummer meetings with Hanley and Glynn, incurred a reimbursible expense which would have shown up on his expense vouchers. Thus the vouchers do not tend to exculpate the petitioners from the incriminating nature of the evidence as to these meetings (See App. 1401-1402) because the vouchers do not, even by implication, tend to show that these meetings did not take place.

Nor are the expense vouchers covering the period of the Purcell's meeting inconsistent with Heath's testimony at trial. It is true that Heath testified that he met with Glynn and Pratt at Purcell's restaurant for lunch (App.

1403) and that Heath's expense vouchers for this period show him lunching with other individuals. But this supposed inconsistency vanishes under scrutiny.

Heath had explicit instructions not to record the names of Glynn or Pratt (a public relations man for Household — App. 1400) on his expense vouchers. As Heath's own meals were not reimbursible (I 19 R 4638) nothing concerning the Purcell's meeting would have appeared on his expense vouchers in any event. The fact that Heath sought reimbursement for lunching with others during this period is placed in proper perspective when it is noted that Heath testified that he met Glynn and Pratt *at Haley's restaurant* and the three then went to Purcell's (I 50 Tr. 3229). There is no inconsistency inherent in these two items of evidence. Clearly, the expense vouchers are nothing more than *additional* evidence of Heath's activities. They in no way controvert his trial testimony.

E. *The Commonwealth Never Agreed To Any Impropriety With Respect To The Expense Vouchers—There Was No "Deal."*

Beneficial, Farrell, Glynn, and Hanley all moved for a new trial on the basis that the Commonwealth made a "deal" with Heath to withhold material exculpatory evidence from them.[28] These petitioners introduced no evidence at the hearing on their motions (I 19 R 4635). They relied instead on affidavits containing two excerpts of testimony from the second trial. In the first excerpt, Heath said it was his "understanding" that the expense vouchers were not going to be used at trial (II 149 Tr. 7556). In the second, Marshall Simonds, a Special Assistant Attorney General

[28] The supposed "deal" relates to the expense vouchers which the Commonwealth has already argued were not exculpatory. *Supra*, pp. 41-42.

who had assisted in the presentation of evidence to the grand jury, testified that "I told [Heath] that I understood his hope and request that they would not become in any way involved in any public proceedings and I told him I would do what I could to accomplish that *so long as my efforts did not interfere with the proper investigation of the matter* (II 199 Tr. 10441-10442) (emphasis supplied). Simonds also flatly denied that he had promised Heath his expense vouchers would not be used (II 199 Tr. 10, 439) and testified that he informed Heath that he was not the Assistnat Attorney General in charge of the prosecution or the presentation of evidence (II 199 Tr. 10,442).

These isolated comments hardly make out a "deal" by the Commonwealth. Simonds was not the individual who determined what portion of the Commonwealth's files were to be turned over to the petitioners. Indeed, he had specifically told Heath that his willingness to refrain from using the expense vouchers was conditioned upon the propriety of such action—"so long as my efforts did not interfere with the *proper* investigation of the matter" (emphsis supplied). This limiting language demonstrates that the Commonwealth never agreed to any impropriety with respect to the expense vouchers and Simonds told Heath so. The best refutation of the story of an alleged "deal," however, is the fact that the Commonwealth itself voluntarily produced these expense vouchers during the course of the second trial. This is hardly consistent with the "deal" theory. The Trial Court, who had the opportunity to observe both Simonds and Heath—the latter over much of the course of the longest criminal trials in the Commonwealth's history—found explicitly, in accordance with Simonds's testimony, that "that the Commonwealth *DID NOT* make a deal with Heath to suppress his expense vouchers" (I 19 R 4636). Certiorari should not be granted on these grounds, particularly since these questions turn on their own facts and affect few, if any, other litigants.

XI. The Petitioners Were Not Twice Placed in Jeopardy for the Same Offense.

Household and Beneficial claim that their trial for conspiracy in the second trial on Indictment 11908 should have been barred on grounds of double jeopardy because of their prior conviction for conspiracy in the first trial under Indictment 11900 (Household Petition 19-23; Beneficial Petition 21-24). This issue is considered in the opinion below at App. 1391-1393.

While the charging language of the indictments is the same, they were sufficiently dissimilar with respect to dates and persons named to raise a material question of fact as to whether the two conspiracies were in fact the same. The bills of particulars and Representations of Evidence filed by the Commonwealth prior to the commencement of the second trial showed that the two conspiracies were not the same, but constituted two separate, well defined agreements. The conspiracy involved the first trial was a narrow agreement, limited in time, having as its sole purpose the making of a "one shot" payment to Hanley for himself and members of the Rate Board in connection with the 1962 Rate Board hearing. In contrast, the conspiracy in the second trial involved a continuing agreement to make annual payments to Hanley so that he would take a position favorable to the small loans industry "... in order to insure in general that his official acts were in the bests interests of the small loans industry." (App. 1391-1392). The evidence at the trials confirmed the existence of two separate agreements, involving separate offenses, having a number of different parties as well as some similar parties, and involving different time periods (App. 1398-1412; 1488-1514). The finding of fact by the court below that two separate agreements existed was correct, and provides no basis for the granting of the writ.

The result reached by the Supreme Judicial Court is fully consistent with federal decisions, which require an examination of the evidence to determine whether or not there is in fact double jeopardy, *Short* v. *United States*, 91 F.2d 614, 620-623 (4th Cir. 1937); *United States* v. *H. E. Koontz Creamery, Inc.*, 257 F. Supp. 295 (D. Md. 1969); *United States* v. *American Honda Motor Co., Inc.*, 271 F. Supp. 979 (N.D. Cal. 1967); See *Duncan* v. *Tennessee*, U.S. , , 40 U.S. Law Week 4206, 4207 (1972) (dissenting opinion of Mr. Justice Brennan). This Court should not be required to make such a lengthy examination of 20,000 pages of transcript.

The decision below meets fully the standards of *Benton* v. *Maryland*, 395 U.S. 784 (1969), and the contentions made by Household and Beneficial provide no basis for the relief sought.

XII. The Petitioner Hanley Was Fully Advised of His Right to Counsel.

The petitioner Hanley contends, at pages 12 and 13 of his petition, that he was not adequately advised of his right to counsel. This issue is covered in the opinion of the court below at App. 1530-1531.

During the first trial Hanley was represented by counsel. Before the commencement of the second trial Hanley's attorney made a motion to withdraw his appearance. At the hearing on that motion the trial judge said to Hanley, who was himself a lawyer and a member of the Massachusetts Bar: "[T]here is a standing order in Suffolk County that a lawyer who once files an appearance for a Defendant in a criminal case may not withdraw that appearance without leave of court" (App. 1530). "Hanley then informed the court that he understood, but preferred to appear pro se in the second trial" (*Ibid.*). The judge was aware that

Hanley was a lawyer and a member of the Massachusetts Bar (*Ibid.*).

It is apparent that Hanley's contention that he was not advised of his right to counsel is flatly contradictory to the record, which demonstrates that the judge informed him that his attorney could not withdraw without the court's permission. Hanley's understanding was manifested by his expressed desire to represent himself. As the Supreme Judicial Court points out at App. 1530, Hanley, in the proceedings before the Supreme Judicial Court, "... failed to point to even one instance of his alleged incompetence". No substantial question is raised by Hanley's contentions, and no reason for granting the writ.

Conclusion

For the foregoing reasons, the Commonwealth respectfully submits that each of these petitions seeking a writ of certiorari to review the opinion and judgment of the Supreme Judicial Court of Massachusetts ought be denied.

Respectfully submitted,

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